This publication supplements Senate Document 92-82, The Constitution of the United States of America: Analysis and Interpretation—it should be inserted in the pocket on the inside back cover of that volume

93D CONGRESS, 2d Session } SENATE { DOCUMENT No. 93-134

THE CONSTITUTION

OF THE

UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

1974 SUPPLEMENT

ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JULY 25, 1974

PREPARED BY THE
CONGRESSIONAL RESEARCH SERVICE
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U.S. GOVERNMENT PRINTING OFFICE
42-700 O WASHINGTON : 1974

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LETTER OF TRANSMITTAL

THE LIBRARY OF CONGRESS,
CONGRESSIONAL RESEARCH SERVICE,
Washington, D.C., November 14, 1974.

Hon. HOWARD CANNON,
Chairman, Committee on Rules and Administration,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I am transmitting herewith the first supplement to *The Constitution of the United States of America—Analysis and Interpretation*, which was prepared by the Congressional Research Service pursuant to Public Law 91–589, signed into law December 24, 1970. That statute, you recall, mandates the Service to prepare a revised edition every ten years and to prepare at the end of each second Term of the Supreme Court a cumulative supplement to keep each volume current. Accordingly, the first supplement covers the October 1972 and 1973 Term, concluding on July 25, 1974.

These two Terms of the Supreme Court were important ones in the development of constitutional interpretation. Executive privilege, the claim of confidentiality by the President, was dealt with for the first time in our history in a Supreme Court opinion. The issue of metropolitan busing to achieve desegregation was the subject of a major decision. New guidelines for the adjudication of pornography cases were set out. Of especial interest to Members of Congress and citizens generally was a series of decisions in which the Court evaluated under equal protection standards state electoral practices affecting all of us.

Mr. Johnny H. Killian of the American Law Division was editor of this supplement and Mr. George Costello was associate editor; I remained as supervising editor. Editorial and clerical assistance was provided by Mrs. Joan Souders. We are grateful for the invaluable assistance of Mr. John P. Coder of the Committee on Rules and Administration and of Mr. Donald W. Casey, Senate Printing Clerk, and Mr. Hugh A. Travis, Assistant Senate Printing Clerk.

We trust that this supplement continues to serve the needs of Members of Congress and their staffs consistently with the desires expressed through Public Law 91–589.

LESTER S. JAYSON,
Director.

PREFACE

By the Honorable Howard W. Cannon

Chairman, Senate Committee on Rules and Administration

In Public Law 91–589, Congress called upon the Congressional Research Service to issue at regular ten-year intervals its invaluable *Constitution of the United States of America—Analysis and Interpretation* and to supplement each volume with cumulative pocket parts each two years. In the Ninety-second Congress, my predecessor, the Honorable B. Everett Jordan, presented to Congress the first product of that law, Senate Document 92–82, setting out in some 2,000 pages the judicial and historical development, section by section, of the Constitution, through June 29, 1972. I now have the honor to present to Congress the first of the mandated supplements, covering the period from the end of the main edition to July 25, 1974.

The Ninety-third Congress has seen historic constitutional struggles, that reveal clearly the interrelationships of different constitutional provisions and that have demonstrated our constitutional law to be one seamless web of congressional, judicial, and executive practice. Major judicial decisions came down during this period and are treated herein. But any reader who doubts that constitutional law involves more than court decisions is invited to examine herein the discussion of congressional actions on impeachment, on war powers, on impoundments, and on executive privilege as well. The reader will find treated in varying lengths all these matters.

The main volume was prepared with a place for pocket parts in back. Therefore, these two works can be treated together as a unified analysis of the Constitution. I fully expect the volume to be of considerable assistance to Members and their staffs in the course of our work ahead.

P. 19, the signers for North and South Carolina should be:

North Carolina	WM BLOUNT RICHD DOBBS SPRAIGHT HU WILLIAMSON
South Carolina	CHARLES COTESWORTH PINCKNEY CHARLES PINCKNEY PIERCE BUTLER J. RUTLEDGE

AMENDMENT PENDING BEFORE THE STATES

Proposed Amendment XXVII

[p. 47]

As of August 15, 1974, 33 States had ratified the proposed Amendment. In addition to the 22 previously listed, they are: Wyoming, January 24, 1973; South Dakota, February 2, 1973; Minnesota, February 8, 1973; Oregon, February 8, 1973; New Mexico, February 12, 1973; Vermont, February 21, 1973; Connecticut, March 15, 1973; Washington, March 22, 1973; Maine, January 18, 1974; Montana, January 21, 1974; Ohio, February 7, 1974. Two States have voted to rescind their ratifications; Nebraska, March 15, 1973; Tennessee, April 23, 1974. The effect of a vote of rescission on the previous ratification is apparently for Congress to determine when it is called upon to decide whether the proposed Amendment is adopted in the event 38 States vote to ratify. See *Coleman* v. *Miller,* 307 U.S. 433 (1939).

ARTICLE I—LEGISLATIVE DEPARTMENT

Sec. 1—The Congress

Delegation

[P. 72, add to N. 16:]

And note *National Cable Television* v. *United States*, 415 U.S. 336 (1974).

Investigatory Power

[P. 96, add to N. 14:]

United States Servicemen's Fund v. *Eastland*, 488 F. 2d 1252 (C.A.D.C. 1973), held that when a subpoena is issued to a third party, such as here, a bank, and that party cannot or will not resist the subpoena, a party whose rights are claimed to be invaded by the mere fact of compelled disclosure can sue to enjoin compliance with the subpoena.

Sec. 2, Cl. 1—Congressional Districting

[P. 99, following N. 28 in text, add:]

Adhering to *Kirkpatrick* v. *Preisler*,[1.5] the Court upheld a lower court voiding of a Texas congressional districting plan in which the population difference between the most and least populous districts was 19,275 persons and the average deviation from the ideally populated district was 3,421 persons.[2.5] However, the Court set aside the district court's choice of a districting plan which had been drawn up without reference to the plan the legislature had enacted, instructing the court instead to adopt an alternative plan which followed more closely the legislators' desires.[3.5]

[1.5] 394 U.S. 526 (1969).

[2.5] *White* v. *Weiser*, 412 U.S. 783 (1973). Concurring, Justices Powell and Rehnquist and Chief Justice Burger noted that they would have decided *Preisler* differently but so long as the Court did not choose to reconsider it they agreed this case was controlled by it. Id., 798.

[3.5] The plan chosen by the district court had a slightly larger population variance than the alternative plan, but this point was not the basis of decision. "Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state

legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should primarily honor state policies in the context of congressional reapportionment." Id., 795. Justice Marshall disagreed with this rationale. Id., 798.

Sec. 6, Cl. 1—Privilege of Speech or Debate

[P. 122, following N. 11 in text, add:]

Continuing the trend evident in *Gravel* v. *United States* [1.5] and *United States* v. *Brewster*,[2.5] the Court in *Doe* v. *McMillan* [3.5] in effect limited the protection of the speech or debate clause by inquiring into the nature of the "legislative acts" performed by Members and staff personnel. A committee had conducted an authorized investigation into conditions in the schools of the District of Columbia and had issued a report which the House of Representatives had routinely ordered printed. In the report, named students were dealt with in an allegedly defamatory manner and their parents sued various Committee Members and staff and other personnel, including the Superintendent of Documents and the Public Printer, seeking to restrain further publication, dissemination, and distribution of the report until the objectionable material was deleted and also seeking damages. The Court held that the Members of Congress and the staff employees had been properly dismissed from the suit, inasmuch as their actions—conducting the hearings, preparing the report, and authorizing its publication—were protected by the speech or debate clause. The Superintendent of Documents and the Public Printer were held, however, to have been properly named, because, as congressional employees, they had no broader immunity, either under the speech or debate clause or under the common-law doctrine of official immunity, than Members of Congress would have. At this point, the Court distinguished between those legislative acts, such as voting, speaking on the floor or in committee, issuing reports, which are within the protection of the clause, and other acts which enjoy no such protection. Public dissemination of materials outside the halls of Congress is not protected, the Court held, although it serves the "informing function" of Congress, because it is unnecessary to the performance of official legislative action.[4.5]

[1.5] 408 U.S. 606 (1972).

[2.5] 408 U.S. 501 (1972).

[3.5] 412 U.S. 306 (1973).

[4.5] "The business of Congress is to legislate; Congressmen and aides are absolutely immune when they are legislating. But when they act outside the 'sphere of legitimate legislative activity,' . . . they enjoy no special immunity from local laws protecting the good name or the reputation of the ordinary citizen." Id., 324. The Court did not doubt the importance of the informing function but did not consider it an integral part of the legislative process. Id., 314–317.

Difficulty attends an assessment of the effect of the decision inasmuch as the Justices in the majority adopted mutually inconsistent stands [5.5] and there were four dissenters who believed the acts complained of were protected by the speech or debate clause.[6.5] The case also leaves very much in doubt the propriety of injunctive relief to restrain publication or some other act of Congress.[7.5]

[5.5] Justices Douglas, Brennan, and Marshall, while joining the opinion of the Court, also concurred in an opinion which, contrary to the opinion of the Court, did accept the informing function as a legislative act, but would deny immunity in any event because in their view a legislative act that infringes upon the constitutional rights of citizens is subject to review and remedial action in the federal courts. Id., 325.

[6.5] Justices Rehnquist, Stewart, Blackmun, and Chief Justice Burger would have held all the legislative parties immune under the speech or debate clause, on the basis that all the actions complained of had been specifically authorized by the House of Representatives. Id., 331, 332, 338.

[7.5] Justice Douglas' concurrence states without elaboration that the plaintiffs "are entitled to injunctive relief." Id., 330. Three of the dissenters argued that the principle of separation of powers forbade a court to grant the requested injunctive relief. Id., 343–345. The opinion of the Court does not discuss the question.

Sec. 8, cl. 3—Regulation of Commerce: State Taxing Power

[P. 200, add to N. 23:]

See also *United Air Lines* v. *Mahin*, 410 U.S. 623 (1973).

[P. 209, add at conclusion of N. 15:]

For the effect of § 381 in context of liquor taxation, see *Heublein* v. *South Carolina Tax Comm.*, 409 U.S. 275 (1972).

[P. 224, add to N. 12:]

See also *Evco* v. *Jones*, 409 U.S. 91 (1972).

Concurrent Federal-State Jurisdiction: Preemption

[P. 277, add to text following N. 8:]

The Court seems presently to be leaning away from a finding of preemption in the absence of express language in federal law or the presence of a "fatal conflict" between federal and state law because of the pervasiveness of federal regulation. While the standard remains the same, of course, the application of the standard appears to be weighed against a finding of preemption. Thus, a state liability scheme imposing cleanup costs and strict, no-fault liability on shore facilities and ships for any oil-spill damage was held to complement a federal law concerned solely with recovery of actual cleanup costs incurred

by the Federal Government and which textually presupposed federal-state cooperation.[1.5] On the other hand, a closely divided Court voided a city ordinance placing an 11 p.m. to 7 a.m. curfew on jet flights from the city airport where, despite the absence of preemptive language in federal law, federal regulation of aircraft noise was of such pervasive nature as to leave no room for state or local regulation.[2.5]

[1.5] *Askew* v. *American Waterways Operators*, 411 U.S. 325 (1973). In the context of other federal powers, see *Goldstein* v. *California*, 412 U.S. 546 (1973), and *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470 (1974).

[2.5] *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624 (1973). The opinion was by Justice Douglas and was concurred in by Chief Justice Burger and Justices Brennan, Blackmun, and Powell. Dissenting were Justices Rehnquist, Stewart, White, and Marshall.

Federal Versus State Labor Laws

[P. 278, add to N. 14:]

But a provision of federal law stating that no employer was to be compelled to treat supervisors as employees for purposes of any national or state law was held to preclude suit under a state right-to-work law creating a right to damages for employees discharged for union membership when the discharged employees were supervisors. *Beasley* v. *Food Fair*, 416 U.S. 653 (1974).

Sec. 8, cl. 3—Regulation of Commerce: Federal Versus State Labor Laws

[P. 280, add to first full paragraph on page:]

But in *Letter Carriers* v. *Austin* [3.5] the Court held that federal law preempts state defamation laws in the context of labor disputes to the extent that the State seeks to make actionable defamatory statements in labor disputes published without knowledge of their falsity or in reckless disregard of the truth. Henceforth, only those defamations within the meaning of *New York Times* v. *Sullivan*[4.5] can be made actionable when they occur in the context of a labor dispute.

[3.5] 418 U.S. 264 (1974). Federal law in this instance was a presidential Executive Order governing labor-management relations in the Executive Branch. The labor dispute at issue was an effort by the union to persuade nonmember carriers to join; the rule is expressly made to reach "any publication made during the course of union organizing efforts, which is arguably relevant to that organizational activity". Id., 279. Justices Powell and Rehnquist and Chief Justice Burger dissented. Id., 291.

[4.5] 376 U.S. 254 (1964), *Text, pp. 1002–1007.*

[P. 280, add to N. 8:]

See also *William E. Arnold Co.* v. *Carpenters' District Council*, 417 U.S. 12 (1974).

Commerce with Indian Tribes

[P. 282, in text following N. 8, add:]

Contrary to the discussion in the text, the Court has settled upon the commerce clause as one of the two bases of authority empowering the Federal Government to deal with the Indians. "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making."[1.5] Forsaking reliance upon concepts of Indian tribes as federal instrumentalities, of the theory of Indian wardship, and of the benefit-burden analysis of tax jurisdiction in Indian cases, and limiting its reliance on a test of the degree of state encroachment upon Indian self-government, the Court indicated that the preemption doctrine was to provide the analytical framework within which to judge the permissibility of assertions of state jurisdiction over the Indians.[2.5] Thus, a state attempt to tax the income of a full-blooded member of a tribe whose entire income was derived from activities on the reservation where she lived and worked was held invalid as an impermissible interference "with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves."[3.5] On the other hand, a state gross receipts tax applied to ski resort facilities on off-reservation property leased by a tribe from the Forest Service was upheld as not being in contravention of applicable federal law, although an application of a use tax on materials used to construct permanent improvements on resort lands was held precluded by statutory immunity.[4.5]

[1.5] *McClanahan* v. *Arizona Tax Comm.*, 411 U.S. 164, 172 n. 7 (1973).

[2.5] Id., 167–173.

[3.5] Id., 165.

[4.5] *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973). A case raising the issue of the power of the State to tax having been lawfully assumed under congressional legislation delegating civil and criminal jurisdiction over reservations to certain States, 67 Stat. 588 (1953), 18 U.S.C. § 1162, 28 U.S.C. § 1360, now amended to require tribal consent, 83 Stat. 79 (1968), 25 U.S.C. § 1321, was remanded for reconsideration in the light of *McClanahan*. *Tonasket* v. *Washington*, 411 U.S. 451 (1973).

Sec. 8, cl. 8—Copyrights and Patents: State Power

[P. 319, add new paragraph in text following N. 8:]

A significant change in Court policy from that prevailing in *Stiffel* and *Compco* [1.5] reverses the presumption established there against the validity of state laws affecting material that comes within the scope of Congress' power, exercised or unexercised, under this clause. The two previous cases held that a State could not utilize unfair competition laws to prevent or punish the copying of products which were not entitled to a patent. Emphasizing the necessity for a uniform national policy and noticing the monopolistic effects of the state protection, the Court inferred that because Congress had not extended the patent [and copyright] laws to the material at issue, federal policy was to promote free access when the materials were thus in the public domain.[2.5] But in *Goldstein* v. *California*,[3.5] the Court distinguished the prior cases [4.5] and held that the determination whether a state "tape piracy" statute conflicted with the federal copyright statute depended upon the existence of a specific congressional intent to forbid state protection of the "writing" that was there involved. Its consideration of the statute and of its legislative history convinced the Court that Congress in protecting certain "writings" and in not protecting other "writings" bespoke no intention that federally unprotected materials should enjoy no state protection but only that Congress "has left the area unattended".[5.5] In the following Term, the Court used similar

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[1.5] *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp.* v. *Day-Brite Lighting*, 376 U.S. 234 (1964).

[2.5] Id., 237.

[3.5] 412 U.S. 546 (1973). The opinion by Chief Justice Burger was joined by Justices Stewart, White, Powell, and Rehnquist. Justices Douglas, Brennan, Marshall, and Blackmun dissented. Id., 572, 576.

[4.5] "Congress had balanced the need to encourage innovation and originality of invention against the need to insure competition in the sale of identical or substantially identical products. The standards established for granting federal patent protection to machines thus indicated not only which articles in this particular category Congress wished to protect, but which configurations it wished to remain free." Id., 569.

[5.5] Id., 570. Basic to the decisions is the principle that the States are not precluded by the copyrights and patents clause from legislating at all in the field. The clause does not confer on Congress exclusive power nor deny any power to the States. Neither is it necessarily the case that the exercise of state authority will always be repugnant to the federal scheme. Therefore, despite previous intimations, *Sears, Roebuck & Co.* v. *Stiffel, Co.*, 376 U.S. 225, 228–231 (1964), the States do have areas of interest about which they may legislate. *Goldstein* v. *California*, 412 U.S. 546, 552–560 (1973).

analysis to sustain the application of a state trade secret law to protect a chemical process, that was patentable but not patented, from utilization by a commercial rival which had obtained the process from former employees of the company all of whom had signed agreements not to reveal the process. The Court determined that protection of the process by state law was not incompatible with the federal patent policy of encouraging invention and public use of patented invention inasmuch as the trade secret law serves other interests not similarly served by the patent law and where it protects matter clearly patentable it is not likely to deter applications for patents.[6.5]

[6.5] *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470 (1974). Justice Marshall concurred on the basis that while aware of the trade secrets issue Congress had never disapproved its application in the patent area, id., 493, while Justice Douglas and Brennan dissented. Id., 495.

Sec. 8, cls. 11–14—War Powers: Declaration of War

[P. 328, add to N. 21:]

Taking what amounted to its first action on the merits of a war powers case the Court summarily affirmed a three-judge district court's dismissal of a suit on political question grounds. *Atlee* v. *Richardson*, 411 U.S. 911 (1973), *aff'g.*, 347 F. Supp. 689 (D.C.E.D.Pa. 1972). Justices Douglas, Brennan, and Stewart would have taken the case for review. In another case, Justice Marshall refused to vacate a stay of an appeals court holding in abeyance a district court injunction prohibiting United States military action in Cambodia, Justice Douglas thereupon vacated the stay, and Justice Marshall, with the concurrence of the other seven Justices, imposed a new stay. *Holtzman* v. *Schlesinger*, 414 U.S. 1304 (1973) (Marshall), id., 1316 (Douglas) id., 1321 (Marshall; Douglas dissenting).

[P. 328, add to N. 22:]

See also *Holtzman* v. *Schlesinger*, 484 F. 2d 1307 (C.A. 2, 1973), cert. den., 416 U.S. 936 (1974); *Mitchell* v. *Laird*, 488 F. 2d 611 (C.A.D.C. 1973).

[P. 329, add to N. 23:]

Congress did in 1973 set an August 15, 1973, cutoff date for United States military activities in Indochina. § 108, P.L. 93–52, 87 Stat. 134. Subsequently, over the President's veto, Congress enacted the War Powers Resolution, designed to curb the President's powers to use military forces in the absence of congressional action. P.L. 93–148, 87 Stat. 555 (1973). *Infra*, *p. S15.*

Trial and Punishment of Offenses

[P. 333, add to N. 5:]

In *Gosa* v. *Mayden*, 413 U.S. 665 (1973), a fractionated Court held that *O'Callahan* should be denied retroactive application. In the course of the opinions, Justice Rehnquist urged the overruling of *O'Callahan*, id., 692, as did Justice Stewart, id., 693 while three Justices in dicta indicated that any offense committed during wartime should be deemed "service-connected." Id., 686, 692, 693 (Justices Douglas, Rehnquist, and Stewart).

Sec. 8, cls. 11–14—War Powers: Trial and Punishment of Offenses

[P. 333, add new paragraph following last paragraph on page:]

Upholding Articles 133 and 134 of the Uniform Code of Military Justice, the Court stressed the special status of military society.[1.5] "This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. . . . More recently we noted '[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian,' . . . and that 'the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty. . . .' "[2.5] This difference has resulted in a military Code that regulates aspects of the conduct of members of the military which in the civilian sphere would go unregulated, but on the other hand the penalties imposed range from the severe to well below the threshold of that possible in civilian life. Because of these factors, the Court, while agreeing that constitutional limitations applied to military justice, was of the view that the standards of constitutional guarantees were significantly different in the military than in civilian life. Thus, the vagueness challenge to the Articles was held to be governed by the standard applied to criminal statutes regulating economic affairs, the most lenient of vagueness standards.[3.5] Neither did application of the Articles to conduct essentially composed of speech necessitate a voiding of the conviction, inasmuch as the speech was unprotected and even while it might reach protected speech the officer here was unable to raise that issue.[4.5]

[1.5] *Parker* v. *Levy*, 417 U.S. 733 (1974). Article 133 punishes a commissioned officer for "conduct unbecoming an officer and gentleman", and Article 134 punishes any person subject to the Code for "all disorders and neglects to the prejudice of good order and discipline in the armed forces". Justices Douglas, Stewart, and Brennan dissented, id., 766, 773, and Justice Marshall did not participate.

[2.5] Id., 743–744, quoting *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953), and *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953).

[3.5] 417 U.S. 733, 756.

[4.5] Id., 757–761. "While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission require a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." Id., 758.

[P. 334, add to N. 19:]

A case involving jurisdictional problems and the range of review under *Burns* was before the Court but it was vacated without resolution. *Secretary* v. *Avrech*, 418 U.S. 676 (1974). In *McLucas* v. *DeChamplain*, *prob. juris. noted*, 418 U.S. 904 (1974), these issues plus the requirement of exhaustion of military justice remedies will be presented.

Sec. 8, cl. 16—The Militia Clause

[P. 351, add to N. 1:]

Organizing and providing for the militia being constitutionally committed to Congress and statutorily shared with the Executive, the judiciary is precluded from exercising oversight over the process, *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), although wrongs committed by troops are subject to judicial relief in damages. *Scheuer* v. *Rhodes*, 416 U.S. 233 (1974).

Sec. 8, cl. 17—District of Columbia

[P. 353, in text following N. 16, add:]

In 1973, Congress provided for a limited form of self government in the District, with the major offices to be filled by election.[1.5]

[1.5] District of Columbia Self-Government and Governmental Reorganization Act, P.L. 93–198, 87 Stat. 774.

[P. 355, add to N. 29:]

The court system was sustained in *Palmore* v. *United States*, 411 U.S. 389 (1973).

Sec. 10, cl. 2—Imposts or Duties on Imports and Exports by State

[P. 416, following N. 16 in text, add:]

Applying well settled rules, the Court unanimously upheld a state personal property tax upon business machines specially built by the company for foreign markets which were unsuitable for sale domestically but which were stored in the company's local warehouse. The prospect of eventual exportation, however certain, was not sufficient to immunize the machines from the tax, the Court held; immunity is not available until the article at issue begins its physical entry into the stream of exportation.[2.5]

[2.5] *Kosydar* v. *National Cash Register Co.*, 417 U.S. 62 (1974).

ARTICLE II—EXECUTIVE DEPARTMENT

Sec. 1—The President: Executive Power

[P. 437, following N. 25 in text, add:]

The Court's opinion in *United States* v. *Nixon*[1.5] neither adds to nor subtracts from the argument over the theory of presidential inherent powers, but in practice, while it sustains the existence of executive privilege rooted in the conferral of executive powers upon the President by the Constitution, the decision illustrates quite meaningfully the accountability of the President within the constitutional system in which the courts are the ultimate arbiters of the validity of the assertion of a privilege to refuse to provide information to the courts in connection with the trial of criminal cases. The opinion does accord a high standing to claims of privilege based upon the existence of military, diplomatic, or sensitive national security secrets, but even there apparently the deference of the courts is not to be absolute.[2.5]

[1.5] 418 U.S. 683 (1974). See also *Nixon* v. *Sirica*, 487 F. 2d 700 (C.A.D.C. 1973), on the assertion of privilege with regard to materials sought by a grand jury.

[2.5] *United States* v. *Nixon*, 418 U.S. 683, 706, 710 (1974).

Sec. 2—Power and Duties: Commander in Chief

[P. 464, in text following last paragraph of section, add:]

Over the President's veto, Congress enacted the War Powers Resolution,[3.5] designed to redistribute the war powers between the President and Congress. Although ambiguous in some respects, the Resolution appears to define restrictively the President's powers, to require him to report fully to Congress upon the introduction of troops into foreign areas, to specify a maximum time limitation on the engagement of hostilities absent affirmative congressional action, and to provide a means for Congress to require cessation of hostilities in advance of the time set. The Resolution states that the President's power to commit United States troops into hostilities, or into situations of imminent involvement in hostilities, is limited to instances of

[3.5] P.L. 93–147, 87 Stat. 554. For the congressional intent and explanation see H. Rept. No. 93–287, S. Rept. No. 93–220, and H. Rept. No. 93–547 (Conference Report), all 93d Congress, 1st sess. (1973). The President's veto message is H. Doc. No. 93–171, 93d Congress, 1st sess. (1973).

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(1) a declaration of war, (2) a specific statutory authorization, or (3) a national emergency created by an attack on the United States, its territories or possessions, or its armed forces.[4.5] In the absence of a declaration of war a President must within 48 hours report to Congress whenever he introduces troops (1) into hostilities or situations of imminent hostilities, (2) into a foreign nation while equipped for combat, except in certain nonhostile situations, or (3) in numbers which substantially enlarge United States troops equipped for combat already located in a foreign nation.[5.5] The President is required to terminate the use of troops in the reported situation within 60 days of reporting, unless Congress (1) has declared war, (2) has extended the period, or (3) is unable to meet as a result of an attack on the United States, but the period can be extended another 30 days by the President's certification to Congress of unavoidable military necessity respecting the safety of the troops.[6.5] Congress may through the passage of a concurrent resolution require the President to remove the troops sooner.[7.5] The Resolution further states that no legislation, whether enacted prior to or subsequent to passage of the Resolution will be taken to empower the President to use troops abroad unless the legislation specifically does so and that no treaty may so empower the President unless it is supplemented by implementing legislation specifically addressed to the issue.[8.5] What the effect of adoption of the Resolution will be upon the nature of presidential power in this area and whether it will serve its purpose of reorienting the executive-legislative balance are questions which experience will answer.

[4.5] P.L. 93-147, 87 Stat. 554, § 2(c).
[5.5] Id., § 4(a).
[6.5] Id., § 5(b).
[7.5] Id., § 5(c).
[8.5] Id., § 8(a).

Sec. 3—The Removal Power

[P. 535, following N. 15 in text, add:]

A controversy arose regarding the discharge of the Special Prosecutor appointed to investigate and prosecute violations of law in the Watergate matter. Congress vested in the Attorney General the power to conduct the criminal litigation of the Federal Government,[1.5] and it further authorized him to appoint subordinate officers to assist him in the discharge of his duties.[2.5] Pursuant to presidential direction, the

[1.5] 28 U.S.C. § 516.
[2.5] 28 U.S.C. §§ 509, 510, 515, 533.

Attorney General designated a Watergate Special Prosecutor with broad power to investigate and prosecute offenses arising out of the Watergate break-in, the 1972 presidential election, and allegations involving the President, members of the White House staff, or presidential appointees. He was to remain in office until a date mutually agreed upon between the Attorney General and himself and the regulations provided that the Special Prosecutor "will not be removed from his duties except for extraordinary improprieties on his part." [3.5] On October 20, following the resignations of the Attorney General and the Deputy Attorney General, the Solicitor General as Acting Attorney General formally dismissed the Special Prosecutor [4.5] and three days later rescinded the regulation establishing the office.[5.5] In subsequent litigation, it was held that the firing by the Acting Attorney General had violated the regulations which were in force at the time and which had to be followed until they were rescinded.[6.5] The Supreme Court in *United States* v. *Nixon* [7.5] seems to have confirmed this analysis by the district court in upholding the authority of the new Special Prosecutor to take the President to court to obtain evidence in the President's possession. Left unsettled were two questions, the power of the President himself to go over the heads of his subordinates and to fire the Special Prosecutor himself, whatever the regulations said, and the power of Congress to enact legislation establishing an Office of Special Prosecutor free from direction and control of the President.[8.5]

[3.5] 38 Fed. Reg. 14688 (1973). The Special Prosecutor's status and duties were the subject of negotiation between the Administration and the Senate Judiciary Committee. *Nomination of Elliot L. Richardson to be Attorney General*, Hearings before the Senate Judiciary Committee, 93d Congress, 1st sess. (1973), 143 passim.

[4.5] The formal documents effectuating the result are set out in 9 *Weekly Compilation of Presidential Documents* 1271–1272 (1973).

[5.5] 38 Fed. Reg. 29466 (1973). The Office was shortly recreated and a new Special Prosecutor appointed. 38 Fed. Reg. 30739, as amended by 38 Fed. Reg. 32805. See *Nomination of William B. Saxbe to be Attorney General*, Hearings before the Senate Judiciary Committee, 93d Congress, 1st sess. (1973).

[6.5] *Nader* v. *Bork*, 366 F. Supp. 104 (D.C.D.C. 1973), appeal pending. Aside from the merits of the case, substantial issues of standing and mootness are raised by this case.

[7.5] 418 U.S. 683, 692–697 (1974).

[8.5] The first question remained unstated but the second issue was extensively debated in *Special Prosecutor*, Hearings before the Senate Judiciary Committee, 93d Congress, 1st sess. (1973); *Special Prosecutor and Watergate Grand Jury Legislation*, Hearings before the House Judiciary Subcommittee on Criminal Justice, 93d Congress, 1st sess. (1973).

The Presidential Aegis: Demands for Papers

[P. 536, at end of section, add text:]

Following years in which claims of executive privilege were resolved one way or another on the basis of the political strengths of the parties, in primarily interbranch disputes, the issue was in this period the subject of the first judicial elaboration of the doctrine to take place in our history; the doctrine of executive privilege was at once recognized as existing and having a constitutional foundation while at the same time it was definitely bounded in its assertion by the principle of judicial review. Because of these cases, because of the intensified congressional-presidential dispute, and especially because of the introduction of the issue into an impeachment proceeding, a somewhat lengthy treatment of the doctrine is called for at this point.

Conceptually, the doctrine of executive privilege may well reflect different considerations in different factual situations. Congress may seek information within the possession of the President, either in effectuation of its investigatory powers to oversee the conduct of officials of the Executive Branch or in effectuation of its power to impeach the President, Vice President, or civil officers of the Government. Private parties may seek information in the possession of the President either in civil litigation with the Government or in a criminal proceeding brought by government prosecutors. Generally, the categories of executive privilege have been the same whether it is Congress or a private individual seeking the information, but it is possible that the congressional assertion of need may over-balance the presidential claim to a greater degree than that of a private individual. The judicial precedents are so meagre yet that it is not possible so to state, however.

The doctrine of executive privilege defines the authority of the President to withhold documents or information in his possession or in the possession of the executive branch from compulsory process of the legislative or judicial branch of the government. The Constitution does not expressly confer upon the Executive Branch any such privilege, but it has been claimed that the privilege derives from the constitutional provision of separation of powers and from a necessary and proper concept respecting the carrying out of the duties of the presidency imposed by the Constitution. Historically, assertion of the doctrine has been largely confined to the areas of foreign relations, military affairs, pending investigations, and intragovernmental discus-

sions.[1.5] The current and ongoing litigation involves, of course, the claim of confidentiality of conversations between the President and his aides.

Private Access to Government Information.—Private parties may seek to obtain information from the Government either to assist in defense to criminal charges brought by the Government or in civil cases to use in either a plaintiff's or defendant's capacity in suits with the Government or between private parties.[2.5] In criminal cases, a defendant is guaranteed compulsory process to obtain witnesses by the Sixth Amendment and by the due process clause is guaranteed access to relevant exculpatory information in the possession of the

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[1.5] For a good statement of the basis of the doctrine, the areas in which it is asserted, and historical examples, see *Executive Privilege: The Withholding of Information by the Executive*, Hearings before the Senate Judiciary Subcommittee on Separation of Powers, 92d Congress, 1st sess. (1971), 420–443 (then-Assistant Attorney General Rehnquist). Former Attorney General Rogers, in stating the position of the Eisenhower Administration, identified five categories of executive privilege: (1) military and diplomatic secrets and foreign affairs, (2) information made confidential by statute, (3) investigations relating to pending litigation, and investigative files and reports, (4) information relating to internal government affairs privileged from disclosure in the public interest, and (5) records incidental to the making of policy, including interdepartmental memoranda, advisory opinions, recommendations of subordinates, and informal working papers. *The Power of the President to Withhold Information from the Congress, Memorandum of the Attorney General*, Senate Judiciary Subcommittee on Constitutional Rights, 85th Congress, 2d sess. (Comm. Print) (1958), reprinted as Rogers, "Constitutional Law: The Papers of the Executive Branch," 44 A.B.A.J. 941 (1958). In the most expansive version of the doctrine, Attorney General Kleindeinst argued that the President could assert the privilege as to any employee of the Federal Government to keep secret any information at all. *Executive Privilege, Secrecy in Government, Freedom of Information*, Hearings before the Senate Government Operations Subcommittee on Intergovernmental Relations, 93d Congress, 1st sess. (1973), I: 18 passim. For a strong argument that the doctrine lacks any constitutional or other legal basis, see R. Berger, *Executive Privilege: A Constitutional Myth* (Cambridge: 1974).

[2.5] There are also, of course, instances of claimed access for other purposes, for which the Freedom of Information Act, 80 Stat. 383 (1966), 5 U.S.C. § 552, provides generally for public access to governmental documents. In § 552(b), however, nine types of information are exempted from coverage, several of which relate to the types as to which executive privilege has been asserted, such as matter classified pursuant to executive order, interagency or intra-agency memoranda or letters, and law enforcement investigatory files. See *EPA* v. *Mink*, 410 U.S. 73 (1973); *Vaughn* v. *Rosen*, 484 F. 2d 820 (C.A.D.C. 1973), *cert. den.*, 415 U.S. 977 (1974).

prosecution.[3.5] Generally speaking, when the prosecution is confronted with a judicial order to turn over information to a defendant that it does not wish to make available, the prosecution has the option of dropping the prosecution and thus avoiding disclosure,[4.5] but that alternative may not always be available; in the Watergate prosecution only by revoking the authority of the Special Prosecutor and bringing the cases back into the confines of the Department of Justice could this possibility have been realized.[5.5]

The civil type of case is illustrated in *United States* v. *Reynolds*,[6.5] a tort claim brought against the United States for compensation for the deaths of civilians in the crash of an Air Force plane testing secret electronics equipment. Plaintiffs sought discovery of the Air Force's investigation report on the accident and the Government resisted on a claim of privilege as to the nondisclosure of military secrets. The Court accepted the Government's claim, holding that courts must determine whether under the circumstances the claim of privilege was appropriate without going so far as to force disclosure of the thing the privilege is designed to protect. The showing of necessity of the private litigant for the information should govern in each case how far the trial court should probe; where the necessity is strong, the court should require a strong showing of the appropriateness of the privilege claim but once satisfied of the appropriateness no matter how compelling the need the privilege prevails.[7.5]

Prosecutorial and Grand Jury Access to Presidential Documents.—Rarely will there be situations when federal prosecutors or grand juries seek information under the control of the President, since he has ultimate direction of federal prosecuting agencies, but the Watergate Special Prosecutor, being in a unique legal situation, was held able to take the President to court to enforce subpoenas for

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[3.5] See *Brady* v. *Maryland*, 373 U.S. 83 (1963), and Rule 16, Federal Rules of Criminal Procedure. The earliest judicial dispute involving what later became known as executive privilege arose in *United States* v. *Burr*, 25 F. Cas. 30 and 187 (C.C.D. Va. 1807), in which defendant sought certain exculpatory material from President Jefferson. Dispute continues with regard to the extent of presidential compliance, but it appears that the President was in substantial compliance with outstanding orders if not in full compliance.

[4.5] Cf. *Alderman* v. *United States*, 394 U.S. 165 (1969).

[5.5] Thus, defendant in *United States* v. *Ehrlichman*, 376 F. Supp. 29 (D.C.D.C. 1974), was held entitled to access to material in the custody of the President wherein the President's decision to dismiss the prosecution would probably have been unavailing.

[6.5] 345 U.S. 1 (1953).

[7.5] Id., 7–8, 9–10, 11. See also *Boeing Airplane Co.* v. *Coggeshall*, 280 F. 2d 654 (C.A.D.C. 1960); *Machin* v. *Zuckert*, 316 F. 2d 336 (C.A.D.C. 1963). And see *Totten* v. *United States*, 92 U.S. 105 (1875).

tape recordings of presidential conversations and other documents relating to the commission of criminal actions.[8.5] While holding that the subpoenas were valid and should be obeyed, the Supreme Court recognized the constitutional status of executive privilege, insofar as the assertion of that privilege relates to presidential conversations and indirectly to other areas as well.

Presidential communications, the Court said, have "a presumptive privilege." "The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution." The operation of government is furthered by the protection accorded communications between high government officials and those who advise and assist them in the performance of their duties. "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." The separation of powers basis derives from the conferral upon each of the Branches of the Federal Government of powers to be exercised by each of them in great measure independent of the other Branches. The confidentiality of presidential conversations flows then from the effectuation of enumerated powers.[9.5]

However, the Court continued, the privilege is not absolute. The federal courts have the power to construe and delineate claims arising under express and implied powers. Deference is owed the constitutional decisions of the other Branches, but it is the function of the courts to exercise the judicial power, "to say what the law is." The Judicial Branch has the obligation to do justice in criminal prosecutions, which involves the employment of an adversary system of criminal justice in which all the probative facts, save those clearly privileged, are to be made available. Thus, while the President's claim of privilege is entitled to deference, the courts must when the claim depends solely on a broad, undifferentiated claim of confidentiality balance two sets of interests.

"In this case we must weigh the importance of the general privilege of confidentiality of presidential communications in performance

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[8.5] *United States* v. *Nixon*, 418 U.S. 683, 692–697 (1974).

[9.5] Id., 707–708. Presumably, the opinion recognizes a similar power existent in the federal courts to preserve the confidentiality of judicial deliberations, cf. *New York Times Co.* v. *United States*, 403 U.S. 713, 752 n. 3 (1971) (Chief Justice Burger dissenting), and in each House of Congress to treat many of its papers and documents as privileged, cf. *Soucie* v. *David*, 448 F. 2d 1067, 1080, 1081–1082 (C.A.D.C. 1971) (Judge Wilkey concurring); *Military Cold War Escalation and Speech Review Policies*, Hearings before the Senate Committee on Armed Services, 87th Congress, 2d sess. (1962), 512 (Senator Stennis), matters which are apparently not the subject of any cases testing the practice.

of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

"On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. . . .

"We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." [10.5]

Obviously, this decision leaves much unresolved. It does recognize the constitutional status of executive privilege as a doctrine. It does affirm the power of the courts to resolve disputes over claims of the privilege. But it leaves unsettled just how much power the courts have to review claims of privilege to protect what are claimed to be military, diplomatic, or sensitive national security secrets.[11.5] It does not indicate what the status of the claim of confidentiality of conversations is when it is raised in civil cases. Nor does it touch upon denial of information to Congress.

Congressional Access to Executive Branch Information.— Presidents and Congresses have engaged in protracted disputes over

[10.5] 418 U.S. 683, 711–713. Essentially the same decision had been arrived at in the context of subpoenas of tapes and documentary evidence for use before a grand jury in *Nixon* v. *Sirica*, 487 F. 2d 700 (C.A.D.C. 1973). Nothing in the Supreme Court's decision nor that of the Court of Appeals concerns directly the problem of enforcement of a judicial decision against the President, whether he may be judicially compelled to act. In a recent decision, it was held that the President himself could be compelled to perform a judicially-construed duty imposed by statute when no inferior officer is available to whom the order could be directed. *National Treasury Employees Union* v. *Nixon*, 492 F. 2d 587 (C.A.D.C. 1974). The decision was not appealed to the Supreme Court.

[11.5] The language of the Court implies that claims of privilege relating to "military, diplomatic, or sensitive national security secrets" when the trial court is satisfied of the appropriateness of the claims present such weight as to overbalance competing claims. 418 U.S. 683, 706.

provision of information from the former to the latter, but the basic thing to know is that most congressional requests for information are complied with. The disputes, however, have been colorful and varied.[12.5] The basic premise of the concept of executive privilege, as it is applied to resist requests for information from Congress as from private parties with or without the assistance of the courts, is found in the doctrine of separation of powers, the prerogative of each co-equal branch to operate within its own sphere independent of control or direction of the other branches. In this context, the President then asserts that phase of the claim of privilege relevant to the moment, such as confidentiality of communications, protection of diplomatic and military secrets, preservation of investigative records. Counterposed against this assertion of presidential privilege is the power of Congress to obtain information upon which to legislate, to oversee the carrying out of its legislation, to check and root out corruption and wrongdoing in the Executive Branch, involving both the legislating and appropriating function of Congress, and in the final analysis to impeach the President, the Vice President, and all civil officers of the Federal Government.

Until quite recently, all disputes between the President and Congress with regard to requests for information were settled in the political arena, with the result that few if any lasting precedents were created and only disputed claims were left to future argument. The Senate Select Committee on Presidential Campaign Activities, however, elected to seek a declaratory judgment in the courts with respect to the President's obligations to obey its subpoenas. The Committee lost its case but the courts based their rulings upon prudential considerations rather than upon questions of basic power, inasmuch as by the time the case was considered impeachment proceedings were pending in the House of Representatives.[13.5] The House Judiciary Committee subpoenas were similarly rejected by the President, but instead of going to the courts for enforcement the Committee adopted as one of its Articles of Impeachment the refusal of the President to honor its

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[12.5] For conflicting accounts of many of the disputes and conflicting conclusions drawn therefrom, compare *Executive Privilege: The Withholding of Information by the Executive*, Hearings before the Senate Judiciary Subcommittee on Separation of Powers, 92d Congress, 1st sess. (1971), 420 (then-Assistant Attorney General Rehnquist), and *Executive Privilege, Secrecy in Government, Freedom of Information*, Hearings before the Senate Government Operations Subcommittee on Intergovernmental Relations, 93d Congress, 1st sess. (1973), 18 (then-Attorney General Kleindienst), with R. Berger, *Executive Privilege: A Constitutional Myth* (Cambridge: 1974), 163–208.

[13.5] *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 370 F. Supp. 521 (D.C.D.C.), *aff'd.*, 498 F. 2d 725 (C.A.D.C. 1974).

subpoenas.[14.5] Pending before Congress late in the second session of the 93d Congress were bills by which Congress would authorize congressional committees to go to court to enforce their subpoenas; the bills, however, do not purport to define executive privilege in any manner, leaving the federal courts to determine whether compliance would be in the public interest.[15.5]

[14.5] The President's position was set out in a June 9, 1974, letter to the Chairman of the House Judiciary Committee. 10 *Weekly Compilation of Presidential Documents* 592 (1974). The impeachment Article and supporting material is set out at H. Rept. No. 93–1305, 93d Congress 2d sess. (1974).

[15.5] See S. 2432, 93d Congress, 1st sess. (1973), and S. Rept. No. 93–612. The bill passed the Senate December 15, 1973. And see H.R. 12462, 93d Congress, 2d sess. (1974), and H. Rept. No. 93–990.

Sec. 3—Powers and Duties

[P. 551, in text following N. 10, add:]

Impoundment of Appropriated Funds.—In his Third Annual Message to Congress President Jefferson established the first faint outline of what has been in recent years a major controversy. Reporting that $50,000 in funds which Congress had appropriated for fifteen gunboats on the Mississippi remained unexpended, the President stated that a "favorable and peaceful turn of affairs on the Mississippi rendered an immediate execution of the law unnecessary . . . ." But he was not refusing to expend the money, only delaying action to obtain improved gunboats; a year later, he told Congress that the money was being spent and gunboats were being obtained.[1.5] A few other instances of deferrals or refusals to spend occurred in the Nineteenth and early Twentieth Centuries but it was only with the Administration of President Franklin Roosevelt that a President refused to spend moneys for the purposes appropriated. Succeeding Presidents expanded upon these precedents and in the Nixon Administration a well-formulated plan of impoundments was executed in order to reduce public spending and to negate programs established by congressional legislation.[2.5]

[1.5] 1 J. Richardson (comp.), *Messages and Papers of the Presidents* (Washington: 1897), 348, 360.

[2.5] History and law is much discussed in *Executive Impoundment of Appropriated Funds*, Hearings before the Senate Judiciary Subcommittee on Separation of Powers, 92d Congress, 1st sess. (1971); *Impoundment of Appropriated Funds by the President*, Hearings before the Senate Government Operations Ad Hoc Subcommittee on Impoundment of Funds, 93d Congress, 1st sess. (1973).

Impoundment [3.5] has been defended by Administration spokesmen as being a power derived from the President's executive powers and particularly from his obligation to see to the faithful execution of the laws, his discretion in the manner of execution. The President, the argument goes, is responsible for deciding when two conflicting goals of Congress can be harmonized and when one must give way, when for example congressional desire to spend certain moneys must yield to congressional wishes to see price and wage stability. In some respects, impoundment is said or implied to flow from certain inherent executive powers that repose in any President. Finally, statutory support is sought; certain laws are said to confer discretion to withhold spending and it is argued that congressional spending programs are discretionary rather than mandatory.[4.5]

On the other hand, it is argued that Congress' powers under Article I, § 8, are fully adequate to support its decision to authorize certain programs, to determine the amount of funds to be spent on them, and to mandate the Executive to execute the laws. Permitting the President to impound appropriated funds allows him the power of item veto which he does not have and denies Congress the opportunity to override his veto of bills enacted by Congress. In particular the power of Congress to compel the President to spend appropriated moneys is said to derive from Congress' power "to make all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers of Congress and "all other Powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof." [5.5]

The President's decision to impound large amounts of appropriated funds led to two approaches to curtail the power. First, many persons and organizations with a reasonable expectation of receipt

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[3.5] There is no satisfactory definition of impoundment. Legislation enacted by Congress uses the phrase "deferral of budget authority" which is defined to include: "(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or (B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law". § 1011(1), P.L. 93-344.

[4.5] *Impoundment of Appropriated Funds by the President*, Hearings before the Senate Government Operations Ad Hoc Subcommittee on Impoundment of Funds, 93d Congress, 1st sess. (1973), 358 (then-Deputy Attorney General Sneed).

[5.5] Id., 1-6 (Senator Ervin).

of the impounded funds upon their release brought large numbers of suits; with a few exceptions, these resulted in decisions denying the President either constitutional or statutory power to decline to spend or obligate funds.[6.5] Second, Congress in the course of revising its own manner of appropriating funds in accordance with budgetary responsibility provided for mandatory reporting of impoundments to Congress, for congressional disapproval of impoundments, and for court actions by the Comptroller General to compel spending or obligation of funds.[7.5] Presumably, Supreme Court review of several of the lower court decisions will begin to elucidate the constitutional and statutory principles that will guide future actions.

[6.5] Courts of Appeal decisions voiding impoundments are *State Highway Comm. of Missouri v. Volpe*, 479 F. 2d 1099 (C.A. 8, 1973); *Campaign Clean Water* v. *Train*, 489 F. 2d 492 (C.A. 4, 1973), *cert. granted*, 416 U.S. 969 (1974); *City of New York* v. *Train*, 494 F. 2d 1033 (C.A.D.C.), *cert. granted*, 416 U.S. 969 (1974); in *Commonwealth of Pennsylvania* v. *Lynn*, 501 F.2d 848 (C.A.D.C. 1974), the court held that the Secretary was acting within his discretion to withhold exercise of contract authority with regard to three housing programs.

[7.5] Title X of P.L. 93-344, signed by the President July 12, 1974.

Presidential Immunity From Judicial Direction

[P. 571, at conclusion of second full paragraph on page, add:]

The issue, however, may well appear in a somewhat different light following the successful action of the Watergate Special Prosecutor in subpoenaing tape recordings and documents from the President, although the decisions occasioned thereby were couched in declaratory rather than coercive terms.[1.5] Nonetheless, some doubt with regard to the validity of prior firm statements in this regard must be expressed.

[1.5] *United States* v. *Nixon*, 418 U.S. 683 (1974), and *Nixon* v. *Sirica*, 487 F. 2d 700 (C.A.D.C. 1973). And see *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F. 2d 725 (C.A.D.C. 1974). In *National Treasury Employees Union* v. *Nixon*, 492 F 2d 587 (C.A.D.C. 1974), the court held that a writ of mandamus could issue to compel the President to perform a ministerial act, although it said that if any other officer were available to whom the writ could run it should be applied to him.

Sec. 4—Impeachment

[P. 578, at end of section add:]

The Nixon Impeachment.—For the first time in over a hundred years and for only the second time in the Nation's history, Congress moved to impeach the President of the United States, a move forestalled only by the resignation of President Nixon on August 9, 1974. In the course of the proceedings, there recurred strenuous argument with regard to the nature of an impeachable offense, whether only

criminally-indictable actions qualify for that status or whether the definition is broader and of course no resolution was reached.[1.5] A second issue arose that apparently has not been considered before: whether persons subject to impeachment could be indicted and tried prior to impeachment and conviction or whether indictment could only follow the removal from office. In fact, the argument was really directed only to the status of the President, inasmuch as it was argued that he embodied the Executive Branch itself, while lesser executive officials and judges were not of that calibre.[2.5] That issue similarly remained unsettled, the Supreme Court declining to provide some guidance in the course of deciding a case on executive privilege.[3.5]

[1.5] Analyses of the issue from different points of view are contained in Impeachment Inquiry Staff, House Judiciary Committee, *Constitutional Grounds for Presidential Impeachments*, 93d Congress, 2d sess. (1974) (Comm. Print); J. St. Clair, *et al.*, Legal Staff of the President, *Analysis of the Constitutional Standard for Presidential Impeachment* (Washington: 1974); Office of Legal Counsel, Department of Justice, *Legal Aspects of Impeachment: An Overview*, and *Appendix I* (Washington: 1974). And see R. Berger, *Impeachment: The Constitutional Problems* (Cambridge: 1973), which preceded the instant controversy.

[2.5] The question first arose during the grand jury investigation of former Vice President Agnew, during which the United States, through the Solicitor General, argued that the Vice President and all civil officers were not immune from the judicial process and the removal need not precede indictment, but as to the President it was argued that for a number of constitutional and practical reasons the President was not subject to the ordinary criminal process. Memorandum for the United States, *Application of Spiro T. Agnew*, Civil No. 73–965 (D.C.D.Md., filed October 5, 1973). One court specifically held that a federal judge was indictable and could be convicted prior to removal from office. *United States* v. *Isaacs*, 493 F. 2d 1124 (C.A. 7), *cert. den. sub nom. Kerner* v. *United States*, 417 U.S. 976 (1974).

[3.5] The grand jury had named the President as an unindicted co-conspirator in the case of *United States* v. *Mitchell, et al.*, No. 74–110 (D.C.D.C.), apparently in the belief that he was not actually indictable while in office. The Supreme Court agreed to hear the President's claim that the grand jury acted outside its authority, but finding that resolution of the issue was unnecessary to decision of the executive privilege claim it dismissed the petition for *certiorari* of the President as improvidently granted. *United States* v. *Nixon*, 418 U.S. 683, 687 *n.* 2 (1974).

ARTICLE III—JUDICIAL DEPARTMENT

Sec. 1—Judicial Power, Courts, Judges

Legislative Courts: Courts of the District of Columbia

[P. 596, following N. 13 in text, add:]

Congress' action in establishing two separate court systems in the District of Columbia, one system of Article III courts with judges guaranteed tenure and salary and one system of Article I courts with judges of limited tenure and no salary guarantee, was sustained in *Palmore* v. *United States*.[1.5] When legislating for the District, Congress has the power of a local legislature and may, pursuant to the grant of power under Article I, § 8, cl. 17, vest jurisdiction to hear matters of local law and local concern in courts not having Article III characteristics. The defendant's claim that he was denied his constitutional right to be tried before an Article III judge was denied on the basis that it was not absolutely necessary that every proceeding in which a charge, claim, or defense based on an act of Congress or a law made under its authority need be conducted in an Article III court. State courts could hear cases involving federal law as could territorial and military court. "[T]he requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." [2.5] Article III courts were still available in the District to which citizens could resort for consideration of constitutional and statutory matters of general concern, while the Article I courts heard cases of local import, including criminal cases arising under laws applicable only within the District.

[1.5] 411 U.S. 389 (1973).

[2.5] Id., 407–408.

Sec. 1—Judicial Power: Contempt

[P. 609, following N. 14 in text, add:]

The holding in *Sacher* and other federal cases has now been significantly limited by due process constitutional rulings binding on

both federal and state courts. In *Taylor* v. *Hayes*,[1.5] the Court held that, although a trial judge may summarily and without notice or hearing punish contemptuous conduct committed in his presence and observed by him, when he chooses to wait until the conclusion of the proceeding he must afford the alleged contemnor at least reasonable notice of the specific charges and opportunity to be heard in his own defense. Apparently, "a full scale trial" is not required.

[1.5] 418 U.S. 488 (1974). In a companion case, the Court observed that although its rule might conceivably encourage a trial judge to proceed immediately to impose summary punishment rather than to await a calmer moment, "[s]ummary convictions during trial that are unwarranted by the facts will not be invulnerable to appellate review." *Codispoti* v. *Pennsylvania*, 418 U.S. 506, 517 (1974). Justice Rehnquist dissented. Id., 523.

[P. 609, following N. 18 in text, add:]

A jury trial is required when a trial judge awaits the conclusion of a proceeding, tries an alleged contemnor for conduct engaged in before the judge in court, and imposes separate sentences on each count of contempt which in the aggregate total more than six months; but in dictum the Court indicated that if the trial judge should punish each contempt as it occurs during the trial no jury trial will be required no matter what the aggegate total of the sentences.[2.5]

[2.5] *Codispoti* v. *Pennsylvania*, 418 U.S. 506 (1974). Justices Blackmun, Stewart, Rehnquist and Chief Justice Burger thought no jury trial should be accorded in the instance of direct contempt in open court. Id., 522.

[P. 613, add to text at end of last paragraph of subsection:]

Even in the absence of the kind of personal attack on a judge that would likely impair his detachment, a trial judge may be required to excuse himself and turn a citation for contempt over to another judge if the response to the alleged misconduct in his courtroom partakes of the character of "marked personal feelings" being abraded on both sides so that it is likely that the judge has felt a "sting" sufficient to impair his objectivity.[3.5]

[3.5] *Taylor* v. *Hayes*, 418 U.S. 488 (1974). Justice Rehnquist dissented. Id., 523.

Sec. 1—Judicial Power: Habeas Corpus

[P. 619, add to N. 5:]

Indeed, the Court has now held "that when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate or speedier release from that imprisonment, his sole federal remedy is a writ of *habeas corpus*." *Preiser* v. *Rodriguez*, 411 U.S. 475, 500 (1973). *Habeas* may also lie when a prisoner is put

under additional and unconstitutional restraints during his lawful custody. Id., 499. The holding was designed to preclude a prisoner's discretion to bring an action under either *habeas corpus* or under the civil rights statute, that meant that he could avoid the exhaustion requirement of *habeas*.

[P. 620, add to N. 9:]

The Court continues to enlarge the meaning of "custody." In *Hensley* v. *Municipal Court*, 411 U.S. 345 (1973), it held that one who has been convicted in state court and who has exhausted all available state remedies is in custody when he has been released on bail or on his own recognizance. *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973), held that an inmate of an Alabama prison was sufficiently in the custody as well of Kentucky authorities who had lodged a detainer with Alabama to obtain the prisoner upon his release.

[P. 621, add to N. 15:]

Ahrens was effectively overruled in *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973), in which an inmate of an Alabama prison was permitted to bring a *habeas* action against Kentucky officials in federal district court in Kentucky inasmuch as the dispute concerned matters properly located in Kentucky. The *habeas* statute, 28 U.S.C. § 2241(a), was held not to require the filing of *habeas* petitions in the District where the prisoner is confined.

[P. 621, at the conclusion of N. 19 on p. 622, add:]

The exhaustion requirement and its rationales are discussed at some length in *Preiser* v. *Rodriguez*, 411 U.S. 475, 490–497 (1973), and id., 500, 512–524 (Justice Brennan dissenting). A limited exception to the requirement was created in *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973), in which a person serving a jail sentence in one State was held entitled to bring a habeas action to require a second State to bring him to trial now so as not to deny him presently his right to a speedy trial. So long as he had exhausted state court remedies available to him now to present the constitutional claim he need not be required to await the trial in the second State and then to present his claim of denial of a speedy trial.

Too, the Court has recently held that failure to raise certain claims before or at trial precludes a convicted defendant from utilizing these claims on collateral attack on his conviction. *Davis* v. *United States*, 411 U.S. 233 (1973); *Tollett* v. *Henderson*, 411 U.S. 258 (1973). Compare *Kaufman* v. *United States*, 394 U.S. 217 (1969), which permitted a defendant to raise a search and seizure issue he had presented at trial but which he had failed to present on direct appeal. Justice Powell, for himself and Justice Rehnquist and Chief Justice Burger, has argued for the overruling of *Kaufman*. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 250 (1973). And see id., 249 (Justice Blackmun).

The Rule-Making Power

[P. 626, add to N. 5:]

When the Court sent to Congress proposed rules of evidence, Congress by statute suspended them and provided for effectiveness only through congressional enactment. P.L. 93–12, 87 Stat. 9 (1973).

Sec. 2—Jurisdiction: Case and Controversies: Standing

[P. 637, in text following N. 11, add:]

In *United States* v. *Richardson*,[1.5] the Court rejected an effort to extend *Flast* v. *Cohen*, holding that a suit challenging congressional provision for secrecy in the budgetary accounts of the Central Intelligence Agency on the ground of violating Article I, § 9, cl. 7, could not be heard because it did not challenge an exercise of the taxing and spending power and it did not allege a specific limitation of the power in any event. Repeated was *Frothingham's* admonition against a taxpayer's use of "a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." [2.5] The taxpayer's claim that without adequate information on CIA expenditures he could not fulfill his obligations as voter and citizen no doubt represented, the Court thought, "a genuine interest" on his part but "he has not alleged that, as a taxpayer, he is in danger of suffering any particular concrete injury as a result of the operation of this statute." [3.5] The taxpayers' interest was one shared by the public at large and it must be asserted through the political processes. A litigant must distinguish himself from the general citizenry, by showing a personal stake, a particular concrete injury, something more than "generalized grievances." [4.5]

[1.5] 418 U.S. 166 (1974). See also *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 206 (1974).

[2.5] *United States* v. *Richardson*, 418 U.S. 166, 173 (1974), quoting *Flast* v. *Cohen*, 392 U.S. 83, 106 (1968).

[3.5] 418 U.S. 166, 177.

[4.5] Id., 179–180. Justice Powell would have overturned the *Flast* test although he would have preserved the result of *Flast* itself. Id., 180. Justice Stewart would have found standing where the Constitution imposed an affirmative obligation upon government to the taxpayer, which he found met here. Id., 202. Justice Marshall jointed this dissent and Justices Douglas and Brennan dissented separately. Id., 197, 235.

[P. 638, in text following N. 15, add:]

Citizen Suits.—Following *Richardson*, the Court held that a group of persons suing as citizens did not have standing to litigate a contention that membership of Members of Congress in the military reserves constituted a violation of Article I, § 6, cl. 2, forbidding any one "holding any office under the United States" to be a Member of Congress.[5.5] "The only interest all citizens share in the claim advanced by respondents is one which presents injury in the abstract. . . . [The]

[5.5] *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974). Justices Douglas, Brennan, and Marshall dissented. Id., 228, 235.

claimed nonobservance [of the clause], standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance. . . ." Thus, the rule remains "that standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share." [6.5]

Standing of Members of Congress.—The lower federal courts are developing a new specie of standing based upon status, the Member of Congress *qua* Member, a matter which has not yet been reviewed in the Supreme Court. This concept of standing in suits against the Executive Branch depends upon a finding that some interest particular to Members has been infringed by Executive Branch action or that the Member has some particular interest as Member to assert. For example, in *Kennedy* v. *Sampson*,[7.5] the court in permitting a Senator to attack the President's pocket veto of a bill he had sponsored, found that "[t]he precise injury" claimed by the Senator was that the pocket veto "was an unconstitutional act that rendered plaintiff's vote in the Senate for the bill ineffective and deprived him of his constitutional right to vote to override the Presidential Veto in an effort to have the bill passed without the President's signature. This claim of nullification of his vote for the bill and deprivation of his right to vote to override the veto, and thus inhibiting him in the performance of his Senatorial duties, is a clear allegation of injury in fact." A suit by Members for an injunction against continued prosecution of the Indochina war was held maintainable on the theory that if the court found the President's actions to be beyond the authority conferred by the Constitution, "a declaration to that effect would bear upon the duties of plaintiffs to consider whether to impeach defendants, and upon plaintiffs' quite distinct and different duties to make appropriations to support the hostilities, or to take other legislative actions related to such hostilities, ..." [8.5] Other cases have similarly upheld standing [9.5] while a number of others reject any standing arising from the status of Members.[10.5]

[6.5] Id., 217, 220.

[7.5] 364 F. Supp. 1075, 1078 (D.C.D.C. 1973), appeal pending.

[8.5] *Mitchell* v. *Laird*, 488 F. 2d 611, 614 (C.A.D.C. 1973).

[9.5] *Williams* v. *Phillips*, 360 F. Supp. 1363 (D.C.D.C. 1973), appeal pending; *Nader* v. *Bork*, 366 F. Supp. 104 (D.C.D.C. 1973), appeal pending.

[10.5] *Brown* v. *Ruckelshaus*, 364 F. Supp. 258 (D.C.C.D. Calif. 1973). The district court had denied standing to Members *qua* Members in *Mink* v. *EPA*, 410 *U.S. 73 (1973)*, but had allowed them to maintain suit as individuals and the issue was not raised on appeal. In *Holtzman* v. *Schlesinger*, 484 F. 2d 1307 (C.A. 2, 1973), *cert. den.*, 416 U.S. 936 (1974), the court indicated considerable doubt about standing but decided the case on political question grounds.

[P. 638, add to N. 17:]

More recent examples of a lack of a requisite injury as a result of the governmental action challenged are *Linda R. S.* v. *Richard D.*, 410 U.S. 614 (1973) (mother of illegitimate child lacks standing to contest prosecutorial policy of utilizing child support statute to coerce support of legitimate children only); *O'Shea* v. *Littleton*, 414 U.S. 488 (1974) (persons challenging allegedly racially discriminatory prosecutorial and judicial enforcement of criminal laws lack standing in absence of allegations that any of the suitors has suffered direct injury, that any will be subject to discriminatory enforcement in the future, and that the laws are facially invalid); *California Bankers Assn.* v. *Schultz*, 416 U.S. 21 (1974); *United States* v. *Richardson*, 418 U.S. 166 (1974), and *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974), noted *supra* p. S32.

[P. 639, add to N. 20:]

The Court has recently said: "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617 n. 3 (1973); *O'Shea* v. *Littleton*, 414 U.S. 488, 493 n. 2 (1974). An example of this development is *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972) (definition in housing title of 1968 Civil Rights Act of "person aggrieved" as "any person who claims to have been injured by a discriminatory housing practice" confers on white tenants of apartment complex who allege deprivation of benefits of integrated housing standing to challenge landlord's policy).

[P. 639, in text following N. 21, add:]

More recent cases appear to dispense with the "legal right" language, perhaps, but not expressly, emphasizing the "injury in fact" concept that appeared in certain administrative law cases.[11.5]

[11.5] *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617–618 (1973) (requiring an injury and a nexus between the injury and the government action complained of; party must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged action); *O'Shea* v. *Littleton*, 414 U.S. 488, 493–494 (1974). Cf. *Allee* v. *Medrano*, 416 U.S. 802 (1974); *Steffel* v. *Thompson*, 415 U.S. 452 (1974) (one need not actually expose himself to arrest and prosecution in order to have standing to challenge statute that deters exercise of constitutional rights, provided he alleges sufficient facts to show substantiality of fear, as here, prosecution of a companion and express police threats to arrest if he continued in course of action); *Doe* v. *Bolton*, 410 U.S. 179, 188–189 (1973).

[P. 642, add to N. 10:]

Compare *Doe* v. *Bolton*, 410 U.S. 179, 188–189 (1973) (physicians not charged under abortion statute nor threatened with enforcement nonetheless have standing to challenge statute, because as one against whom the laws directly operate they do not have to subject themselves to prosecution which seems certain in event of violation of statute), with *Roe* v. *Wade*, 410 U.S. 113, 127–128 (1973) (childless married couple alleging only that physical harm might befall wife if she became pregnant and could not have abortion and alleging marital strain arising from uncertainty of situation do not present sufficiently immediate threat of injury to

make claims justifiable). *California Bankers Assn.* v. *Schultz*, 416 U.S. 21 (1974), held premature challenges to Bank Secrecy Act provisions when implementing regulations did not utilize reach of provisions complained of.

[P. 644, add to N. 18:]

Gooding was followed in *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974), but the Court has cut back on its overbreadth doctrine in this area as well as generally, holding that when expressive conduct, rather than "pure" speech, is involved, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep", in order that persons whose conduct is within the valid portion of the statute may challenge it because of its invalid coverage. *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973).

[P. 648, in text following N. 9, add:]

Drawing on *Sierra Club*, the Court held that plaintiffs, who had pleaded that they used the natural resources of the Washington area, that rail freight rates would deter the recycling of used goods, and that their use of natural resources would be disturbed by the adverse environmental impact caused by the nonuse of recyclable goods, had standing as "persons aggrieved" under the Administrative Procedure Act to challenge the rates set. Neither the fact that large numbers of persons had suffered the injury nor the fact that the alleged injury to the environment was less direct and perceptible than others might be was justification for denying standing. The Court granted that plaintiffs might never be able to establish the "attenuated line of causation" from rate-setting to injury, but that was a matter for proof at trial, whereas in the present case the Court dealt only with the pleadings.[12.5]

[12.5] *United States* v. *SCRAP*, 412 U.S. 669, 683–690 (1973). Justices White and Rehnquist and Chief Justice Burger dissented on the ground that the alleged injury was too remote, speculative, and insubstantial in fact to confer standing. Id., 722.

Real Interest

[P. 654, add to N. 20:]

The statement in the text is confirmed by *Steffel* v. *Thompson*, 415 U.S. 452 (1974).

[P. 655, add to N. 1:]

Mootness was found to have occurred in *DeFunis* v. *Odegard*, 416 U.S. 312 (1974), in which one challenging an admissions system that kept him out of law school and who was admitted pursuant to court order during pendency of the suit had entered his final semester of law school by the time of oral argument in the Supreme Court with assurances by university officials that he would be allowed to finish the semester regardless of the Court's ruling. Nothing the Court could have done would have affected him at all.

[P. 656, add to text following N. 7:]

A challenge of a state policy of paying public assistance to strikers was held not to be mooted by the termination of the strike, inasmuch as the continuing policy of the State provided a requisite degree of alleged injury to management interests, even in the absence of an actual strike, to justify declaratory relief if merited; even if the existence of a strike were necessary, the case would not be mooted because of the "capable of repetition, yet evading review" exception.[13.5]

[13.5] *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974). The case was decided five-to-four, with Justices Stewart, Powell, Rehnquist, and Chief Justice Burger dissenting. Id., 127.

[P. 656, add to N. 7:]

This exception was applied to prevent the mooting of attacks on abortion laws by plaintiffs who were pregnant at the time of institution of the suit three years earlier. *Roe* v. *Wade*, 410 U.S. 113, 124–125 (1973).

[P. 657, add to N. 10:]

The more recent election cases have uniformly been held to remain viable after the holding of the election under the "capable of repetition, yet evading review" formula. E.g., *Storer* v. *Brown*, 415 U.S. 724, 737 n. 8 (1974).

[P. 657, add to N. 13:]

See esp. *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973).

[P. 658, add to N. 14:]

See also *Michigan* v. *Payne*, 412 U.S. 47 (1973); *Gosa* v. *Mayden*, 413 U.S. 665 (1973).

[P. 659, add to N. 18:]

But in *Robinson* v. *Neil*, 409 U.S. 505 (1973), the case of *Waller* v. *Florida*, 397 U.S. 387 (1970), barring as double jeopardy successive state and municipal prosecution of a person for the same conduct, was held fully retroactive, since it went to the issue of a second trial taking place at all and not to questions of fairness. The standards herein propounded were held inapplicable to decisions of the first category.

Sec. 2—Jurisdiction: Cases and Controversies: Political Questions

[P. 669, in text following N. 10, add:]

The Doctrine Reappears.—Reversing a lower federal court ruling subjecting the training and discipline of National Guard troops to court review and supervision, the Court held that under Article I, § 8, cl. 16, the organizing, arming, and disciplining of such troops are committed to Congress and by congressional enactment to the Executive Branch. "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Con-

stitution to be left to the political branches, directly responsible—as the Judicial Branch is not—to the elective process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches." [1.5] The suggestion of the infirmity of the political question doctrine was rejected, since "because this doctrine has been held inapplicable to certain carefully delineated situations, it is no reason for federal courts to assume its demise." [2.5] In staying a grant of remedial relief in another case, the Court strongly suggested that the actions of political parties in national nominating conventions may also present issues not meet for judicial resolution.[3.5]

[1.5] *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973). Similar prudential concerns seem to underlay, though they did not provide the formal basis for, decisions in *O'Shea* v. *Littleton*, 414 U.S. 488 (1974), and *Mayor* v. *Educational Equality League*, 415 U.S. 605 (1974).

[2.5] 413 U.S., 11. Other considerations of justiciability, however, id., 10, preclude using the case as square precedent on political questions. Justice Douglas, Brennan, Stewart, and Marshall dissented on mootness grounds. Id., 12.

[3.5] *O'Brien* v. *Brown*, 409 U.S. 1 (1972). The issue was mooted by the passage of time and was not thereafter considered on the merits by the Court, id., 816, but a collateral case is before the Court. *Wigoda* v. *Cousins*, 14 Ill. App. 3d 460, 302 N.E. 2d 614 (1974), *cert. granted*, 415 U.S. 956 (1974).

Federal Question Jurisdiction

[P. 685, add to N. 14:]

For a recent problem, see *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974).

[P. 691, add to N. 24:]

On police practices, see *Allee* v. *Medrano*, 416 U.S. 802 (1974) ; but see *O'Shea* v. *Littleton*, 414 U.S. 488 (1974). On prison practices, note the restriction imposed by *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973).

[P. 691, add to N. 25:]

See esp. *Hagans* v. *Lavine*, 415 U.S. 528 (1974).

[P. 692, add to N. 10:]

See *Hagans* v. *Lavine*, 415 U.S. 528 (1974), which enlarged the number of cases that may thus be brought under the district courts' ancillary jurisdiction by its treatment of the sufficiency of the substantiality of a constitutional claim.

[P. 693, add to N. 14:]

See also *North Dakota Board of Pharmacy* v. *Snyder's Drug Stores*, 414 U.S. 156, 159–164 (1973) ; *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 246 (1974).

[P. 694, add to N. 22:]

See also *California* v. *Krivda*, 409 U.S. 33 (1972). Note that in *California Dept. of Motor Vehicles* v. *Rios*, 410 U.S. 425 (1973), the Court remanded an appeal to the state high court for a determination of the ground for decision as a predicate to deciding whether to accept review of the case. Justices Douglas, Brennan, Stewart, and Marshall dissented, Id., 427.

Admiralty

[P. 703, following N. 13 in text, add:]

In a case involving a plane crash in which the plane landed wholly fortuitously in navigable waters off the airport runway, the Court has now required that in aviation tort cases, absent congressional legislation, there must be in addition to the requisite situs a significant relationship to traditional maritime activity in order to invoke properly the admiralty jurisdiction of the federal courts. The Court did not rule out the possibility that under some circumstances, such as transoceanic flights, an aviation tort might have a sufficient maritime relationship but it was clear that there was none when a land-based plane flying from one point in the continental United States to another merely happens to wind up in navigable water.[1.5]

[1.5] *Executive Jet Aviation* v. *City of Cleveland*, 409 U.S. 249 (1972).

[P. 709, add to N. 24:]

In *Askew* v. *American Waterways Operators*, 411 U.S. 325, 337–344 (1973), the Court, in holding that the States may constitutionally exercise their police powers respecting maritime activities concurrently with the Federal Government, such as by providing for liability for oil spill damages, noted that *Jensen* and its progeny, while still possessing vitality, have been confined to their facts; thus it is only with regard "to suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews" that state law is proscribed. Id., 344.

[P. 713, add to N. 25:]

Sea-Land Services v. *Gaudet*, 414 U.S. 573 (1974), began the process of developing the law to be applied in the *Moragne*-wrongful death line of cases.

Sec. 2, Cl. 2—Jurisdiction: Federal-State Court Relations

[P. 767, add to N. 1:]

See also *O'Shea* v. *Littleton*, 414 U.S. 488, 499–504 (1974). But compare *Allee* v. *Medrano*, 416 U.S. 802 (1974). Cf. *Mayor* v. *Educational Equality League*, 415 U.S. 605 (1974).

[P. 777, add to N. 2:]

Steffel v. *Thompson*, 415 U.S. 452 (1974), held that the availability of federal declaratory relief is not dependent upon the *Younger-Samuels* requirement of

irreparable injury through bad-faith harassment when no state prosecution is pending. "[R]egardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied." Id., 475. Still unresolved is the standard for issuance of injunctive relief when no state proceeding is pending, id., 463 and n. 12, but the matter may be relatively unimportant, inasmuch as the Court has indicated that ordinarily it is sufficient to render declaratory relief in the reasonable expectation that state authorities will respect it. *Roe* v. *Wade*, 410 U.S. 113, 166 (1973); *Poe* v. *Gerstein*, 417 U.S. 281 (1974). Cf. *Allee* v. *Medrano*, 416 U.S. 802, 814 (1974) (indicating that ordinary prerequisite of irreparable injury is necessary in absence of pending prosecution for issuance of injunction).

[P. 779, add to N. 10:]

On pre-conviction requirements of exhaustion, see *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973).

[P. 779, add to N. 11:]

If ones does appeal to the Supreme Court, that Court's resolution of the result against him by a four-to-four vote does not preclude subsequent habeas action. *Neil* v. *Biggers*, 409 U.S. 188, 190–192 (1972).

ARTICLE VI—NATIONAL SUPREMACY

Clause 2—Supremacy Clause

[P. 869, add to N. 4:]

And see *State Dept. of Social Services* v. *Dublino*, 413 U.S. 405 (1973); *Philpott* v. *Welfare Board*, 409 U.S. 413 (1973); *Shea* v. *Vialpando*, 416 U.S. 251 (1974). Similarly, federal standards prevail in educational assistance programs. *Lau* v. *Nichols*, 414 U.S. 563 (1974); *Wheeler* v. *Barrera*, 417 U.S. 402 (1974). In *Wheeler*, however, while the federal law required certain undertakings, it expressly did not override state constitutional provisions relating to public assistance to parochial schools. Id., 415–419.

[P. 887, add to N. 24:]

See also *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 150–155 (1973); *McClanahan* v. *Arizona Tax Comm.*, 411 U.S. 164, 169–170 (1973).

AMENDMENT 1—RELIGION AND FREE EXPRESSION

Establishment of Religion—Financial Assistance to Church-Related Institutions

[P. 919, add to N. 14:]

Lemon v. *Kurtzman*, 411 U.S. 192 (1973), held that the State was not precluded from reimbursing schools for expenses incurred in reliance on the voided program up to the date the Supreme Court held the statute unconstitutional. Justices Douglas, Brennan, and Stewart dissented, id, 209, and Justice Marshall did not participate.

[P. 920, following the final paragraph of the subsection, add:]

Several decisions in the October 1972 Term make clear that the discretion of state and federal bodies to assist financially sectarian elementary and secondary schools is quite limited; at the same time, the Court's prior disposition to allow a greater discretion when colleges affiliated with religious institutions are aided has been reaffirmed. Moreover, these decisions reveal a division of opinion among the Justices upon the application of two of the three tests developed in past litigation to provide "helpful signposts"[1.5] in the resolution of concrete controversies. Inasmuch as the application of the tests substantially if not conclusively led to the outcome reached, it is to that matter that we first turn.

A secular purpose is the first requirement to sustain the validity of legislation touching upon religion and upon this requirement the Justices were united; state desire to preserve a healthy and safe educational environment for all of its school children, state interest in promoting pluralism and diversity among its public and nonpublic schools, and state concern to prevent an overburdening of the public school system that would accompany the financial failure of private schools provided adequate legitimate, non-sectarian bases for the legislation under review.[2.5] Upon the tests of secular primary effect and church-

[1.5] *Hunt* v. *McNair*, 413 U.S. 734, 741 (1973). *See text, pp. 913–915.*

[2.5] *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S.

state entanglement, however, varied views were expressed.[3.5] Thus, Chief Justice Burger, in dissent, argued that "government aid to individuals generally stands on an entirely different footing from direct aid to religious institutions." Direct aid to institutions may involve government in assisting the religious institutions' sectarian functions and to avoid this impermissible primary effect necessitate the imposition of governmental monitoring and reviewing activities leading to an impermissible entanglement of state with church.[4.5] Justice Powell's answer denied any controlling significance to the delivery of funds, either directly in grants or indirectly in tax credits, to parents rather than to schools. Delivery to parents is only one factor among many to consider. The controlling question is whether government has established "an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes." [5.5] Grants directly to religious schools would be invalid without such a guarantee and no reason existed for treating differently aid to parents "when the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." [6.5]

Substantial unanimity, at least in result, prevailed among the Justices in dealing with direct financial assistance to sectarian schools, as might have been expected from the argument over the primary effect test. Thus, a state program to reimburse nonpublic schools in the State for a variety of services mandated by state law was struck down because the statute did not distinguish between services, some secular and some potentially religious, the costs of which would be reim-

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756, 773 (1973). See also id., 805 (Chief Justice Burger dissenting), 812–813 (Justice Rehnquist dissenting), 813 (Justice White dissenting).

[3.5] Aside from the principal argument, there was Justice White's view that, whatever the incidental assistance to religion that resulted, there was no *primary* effect of aiding religion. Id., 822–824. The Court's opinion by Justice Powell observed in a long footnote that "[o]ur cases simply do not support the notion that a law found to have a 'primary' effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion." Id., 783 n. 39. There is not, in other words, a hierarchy of "primary" effects, that the uppermost controls, but rather a continuum on which it must be determined whether the religious effects are substantial or whether they are remote and incidental.

[4.5] Id., 798. The quoted sentence is id., 801.

[5.5] Id., 780.

[6.5] Id., 783. Justice Powell also argued that the possibilities of entanglement between church and state were just as substantial when aid was given to parents as when it was given to the schools directly. Id., 794–798.

bursed.[7.5] Similarly, a program of direct money grants to nonpublic schools to be used for the maintenance of school facilities and equipment failed to survive the primary effect test because it did not restrict payment to those expenditures related to the upkeep of facilities used exclusively for secular purposes and because "within the context of these religion-oriented institutions" the Court could not see how such restrictions could effectively be imposed.[8.5]

Substantially similar tuition reimbursement programs from New York and Pennsylvania were also struck down. New York's program provided out of general tax revenues reimbursements for tuition paid by low-income parents to send their children to nonpublic elementary and secondary schools; the reimbursements were of fixed amounts but could not exceed 50 percent of actual tuition paid. Pennsylvania provided fixed-sum reimbursement for parents who send their children to nonpublic elementary and secondary schools, so long as the amount paid did not exceed actual tuition, the funds to be derived from cigarette tax revenues. Both programs, it was held, constituted public financial assistance to sectarian institutions with no attempt to segregate the benefits so that religious activities did not receive any.[9.5]

New York had also enacted a program of tax relief for those parents sending their children to nonpublic schools; relief was available to parents not qualifying for the tuition reimbursements so long as they made less than $25,000 per year and the relief was in the form of fixed sums bearing no relationship to the amounts of tuition paid. "In practical terms there would appear to be little difference, for purposes of determining whether such aid has the effect of advancing religion, between the tax benefit allowed here and the tuition grant allowed under § 2. The qualifying parent under either program re-

[7.5] *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973). Chief Justice Burger wrote the opinion of the Court and only Justice White dissented, but Justices Douglas, Brennan, and Marshall noted their concurrence on the basis of Justice Powell's *Nyquist* opinion, probably because of the presence in the Chief Justice's opinion of some elements of his *Nyquist* dissent. Id., 482.

[8.5] *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 774–780 (1973). Chief Justice Burger and Justice Rehnquist noted their concurrence in this part of the opinion, id., 798, 805–806, and Justice White dissented. Id., 813.

[9.5] *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 780–789 (1973); *Sloan* v. *Lemon*, 413 U.S. 825 (1973). The Court distinguished *Everson* and *Allen* from the present programs on the grounds that in those cases the aid was given to all children and their parents and that the aid was in any event religiously neutral, so that any assistance to religion was purely incidental. Id., 781–782. Chief Justice Burger thought that *Everson* and *Allen* were controlling. Id., 798.

ceives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. We see no answer to Judge Hays' dissenting statement below that '[i]n both instances the money involved represents a charge made upon the state for the purpose of religious education.' " [10.5] Some difficulty, however, was experienced in distinguishing this program from the tax exemption approved in *Walz*.[11.5]

Two subsidiary arguments were rejected by the Court in these cases. First, it had been argued that the tuition reimbursement program promoted the free exercise of religion in that it permitted low-income parents desiring to send their children to school in accordance with their religious views to do so. The Court agreed that "tension inevitably exists between the Free Exercise and the Establishment Clauses", but government is required to neither advance nor inhibit religion and the tuition program inescapably advanced religion and must fall.[12.5] In the Pennsylvania case, it was argued that because the program reimbursed parents who sent their children to nonsectarian schools as well as to sectarian ones the portion respecting the former parents was valid and "parents of children who attend sectarian schools are entitled to the same aid as a matter of equal protection. The argument is thoroughly spurious. . . . The Equal Protection Clause has never been regarded as a bludgeon with which to compel a State to violate other provisions of the Constitution." [13.5]

[10.5] *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 789–794 (1973). The quoted paragraph is id., 790–791.

[11.5] Id., 791–794. Principally, *Walz* was said to be different because of the age of the exemption there dealt with, the fact that it was granted in the spirit of neutrality while the tax credit under consideration was not, and the fact that the *Walz* exemption promoted less entanglement while the credit would promote more.

[12.5] Id., 788–789.

[13.5] *Sloan* v. *Lemon*, 413 U.S. 825, 833–835 (1973). In any event, the Court sustained the District Court's refusal to sever the program and save that portion as to children attending nonsectarian schools on the basis that since so large a portion of the children benefiting attended religious schools it could not be assumed the legislature would have itself enacted such a limited program.

In *Wheeler v. Barrera*, 417 U.S. 402 (1974), the Court held that States receiving federal educational funds were required by federal law to provide "comparable" but not equal services to both public and private school students within the restraints imposed by state constitutional restrictions on aid to religious schools. In the absence of specific plans, the Court declined to review First Amendment limitations on such services.

Sustained, however, was a South Carolina program under which institutions of higher education could enter into contracts with a state authority by which the authority would issue revenue bonds for construction of projects on an institution's campus, thus affording a college a better arrangement in terms of interest costs than it could make otherwise, and the authority would hold formal title to the project. The principal of and the interest on the bonds as well as the expenses of the authority would be paid by the college. The Court did not decide whether this special form of assistance could be otherwise sustained, because it concluded that religion was neither advanced nor inhibited nor was there any impermissible public entanglement. "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." [14.5] The colleges involved, though they were affiliated with religious institutions, were not shown to be so permeated with religion as to fall under the former clause—no religious test existed for faculty or student body, a substantial part of the student body was not of the religion of the affiliation—and state law precluded the use of any project financed under it for religious activities.[15.5]

[14.5] *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973).

[15.5] Id., 739–740, 741–745. Justices Brennan, Douglas, and Marshall, dissenting, rejected the distinction between elementary and secondary education and higher education and foresaw a greater danger of entanglement than did the Court. Id., 749.

AMENDMENT 1—EXPRESSION

Prior Restraint

[P. 944, add to No. 18:]

And see *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49, 54–55 (1973); *Roaden* v. *Kentucky*, 413 U.S. 496 (1973).

Subsequent Punishment: Standards

[P. 960, add to N. 15:]

Recent successful vagueness attacks on statutes were *Smith v. Goguen*, 415 U.S. 566 (1974) (flag desecration law), and *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974) (punishment of opprobrious words). Attacks failed in *Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973) (Hatch Act), and *Parker* v. *Levy*, 417 U.S. 733 (1974) (sections of military law).

[P. 960, add to N. 17:]

The overbreadth doctrine was applied in *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974), but in *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), a five-to-four decision, the Court curbed its use of the doctrine, at least in cases involving "speech-plus," noting "that facial overbreadth adjudication is an exception to our traditional overbreadth adjudication," and holding that "particularly where the conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Id., 615. The opinion of the Court, and Justice Brennan's dissent, id., 621, contain extensive discussion of the doctrine.

Freedom of Belief

[P. 963, add to N. 10:]

See also *Fields* v. *Askew*, 279 So. 2d 822 (Fla. 1973), *aff'd per curiam*, 414 U.S. 1148 (1974), upholding an affirmative loyalty oath as a qualification for registering to vote.

Right of Association

[P. 968, add to N. 19:]

The Court appears to recognize an associational right to involvement in electoral activity as a factor in judging state laws. *American Party of Texas* v. *White*, 415 U.S. 767, 780 (1974).

National Security and First Amendment

[P. 978, add to N. 12:]

In *Indiana Communist Party* v. *Whitcomb*, 414 U.S. 441 (1974), a requirement that parties and candidates seeking ballot space must subscribe to oath that they do not "advocate the overthrow of local, state or national government by force or violence" was voided because the language of the oath did not comport with the advocacy standards of *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). *Text, pp. 961–962.* Four Justices concurred, however, id., 451, on narrower grounds, their opinion containing a hint that they might not subscribe to the opinion of the Court on the merits there reached. Id., 452 n. 3. See also *Whitcomb* v. *Communist Party of Indiana*, 410 U.S. 976 (1973) (summarily affirming lower court invalidation of ballot access oath that party is not affiliated with nor does it cooperate with a foreign government or foreign political party).

Government as Employer: Political Activities

[P. 986, in text following N. 8, add:]

In *Civil Service Commission* v. *National Association of Letter Carriers*,[1.5] the Court sustained the Hatch Act against First Amendment vagueness and overbreadth attack. Preliminarily, the Court reaffirmed its prior holding in *United Public Workers* v. *Mitchell*,[2.5] that the interest of the Government in forbidding partisan political activities by its employees was so substantial that it overrode the rights of those employees to engage in political activities and association;[3.5] therefore, a statute which barred in plain language a long list of activities would be plainly valid.[4.5] The issue in *Letter Carriers*, however, was whether the language Congress did enact, forbidding employees to take "an active part in political management or in political campaigns," was unconstitutional on its face, either because the statute was too imprecise to allow government employees to determine what was forbidden and what was permitted or because the statute swept in under its coverage conduct that Congress could not forbid as well as conduct subject to prohibition or regulation. In respect to vagueness, plaintiffs contended and the lower court had held that the quoted proscription was

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[1.5] 413 U.S. 548 (1973). Justices Douglas, Brennan, and Marshall dissented. Id., 595. In *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), the Court refused to consider overbreadth attacks on a state statute of much greater coverage because the litigants had engaged in conduct that the statute could constitutionally proscribe.

[2.5] 330 U.S. 75 (1947).

[3.5] The interests recognized by the Court as served by the proscription on partisan activities were (1) the interest in the efficient and fair operation of governmental activities and the appearance of such operation, (2) the interest in fair elections, and (3) the interest in protecting employees from improper political influences. 413 U.S., 557–567.

[4.5] Id., 556.

inadequate to provide sufficient guidance and that the only further elucidation Congress had provided was to enact that the forbidden activities were the same activities which the Commission had as of 1940, and reaching back in 1883, "determined are at the time of the passage of this act prohibited on the part of employees . . . by the provisions of the civil-service rules. . . ." This language had been included, it was contended, to deprive the Commission of power to alter thousands of rulings made by it which were not available to employees and which were in any event mutually inconsistent and too broad.

The Court held, on the contrary, that Congress had intended to confine the Commission to the boundaries of its rulings as of 1940 but had further intended the Commission by a process of case-by-case adjudication to flesh out the prohibition and to give content to it. That the Commission had done and it had regularly summarized the rules which it followed in understandable terms and it was authorized as well to issue advisory opinions to employees uncertain of the propriety of contemplated conduct. "[T]here are limitations in the English language with respect to being both specific and manageably brief," said the Court, but it thought the prohibitions as elaborated in Commission regulations and rulings were "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." [5.5] There were conflicts, the Court conceded, between some of the things forbidden and some of the protected expressive activities, but these were at most marginal. Thus, some conduct arguably protected did under some circumstances so partake of partisan activities properly proscribable. But the Court would not invalidate the entire statute for this degree of overbreadth.[6.5]

[5.5] Id., 578–579.

[6.5] Id., 580–581. On overbreadth, see *text pp. 960–961*, and *supra, p. S35.*

Government as Employer: Free Expression Generally

[P. 989, in text following N. 17, add:]

Following the analysis of *Letter Carriers*, the Court sustained the constitutionality of a provision of federal law authorizing removal or suspension without pay "for such cause as will promote the efficiency of the service" when the "cause" cited concerned speech by the employee.[7.5] The employee had charged that his superiors had made an offer of a bribe to a private person. The quoted phrase, the Court held, "is without doubt intended to authorize dismissal for speech as well as

[7.5] *Arnett* v. *Kennedy*, 416 U.S. 134 (1974). Justice Douglas, Brennan, and Marshall dissented. Id., 203, 206. The language quoted is from 5 U.S.C. § 7501(a).

other conduct." But the authority conferred was not impermissibly vague inasmuch as it is not possible to encompass within a statutory enactment all the myriad different situations that arise in the course of employment and the language used was informed by developed principles of agency adjudication coupled with a procedure for obtaining legal counsel from the agency on the interpretation of the law.[8.5] Neither was the language overbroad, held the Court, because it "proscribes only that public speech which improperly damages and impairs the reputation and efficiency of the employing agency, and it thus imposes no greater controls on the behavior of federal employees than are necessary for the protection of the Government as an employer. . . . We hold that the language 'such cause as will promote the efficiency of the service' in the Act excludes constitutionally protected speech, and that the statute is therefore not overbroad." [9.5]

[8.5] 416 U.S. 134, 158–164.

[9.5] Id., 162. In dissent, Justice Marshall argued: "The Court's answer is no answer at all. To accept this response is functionally to eliminate overbreadth from the First Amendment lexicon. No statute can reach and punish constitutionally protected speech. The majority has not given the statute a limiting construction but merely repeated the obvious." Id., 229.

Incidental Government Restrictions

[P. 991, add to N. 1:]

And see *Papish* v. *Board of Curators*, 410 U.S. 667 (1973).

[P. 995, following N. 23 in text, add:]

Government as Administrator of Prisons.—A prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.[10.5] The identifiable governmental interests at stake in its administration of prisons are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners.[11.5] In applying these general standards, the Court recently arrived at somewhat divergent points in assessing prison restrictions on mail and on face-to-face news interviews between newsmen and prisoners. Thus, in *Procunier* v. *Martinez*, [12.5] in which the Court struck down mail censorship regulations that permitted authorities to hold back or to censor mail to and from prisoners whenever they

[10.5] *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974).

[11.5] *Procunier* v. *Martinez*, 416 U.S. 396, 412 (1974).

[12.5] 416 U.S. 396 (1974).

thought the letters "unduly complain[ing]," "express[ing] inflammatory . . . views or beliefs," or were "defamatory" or "otherwise inappropriate," the Court held that the rights of both the prisoner and the person outside were implicated. Whatever the basic right of the prisoner, the outsider's right to communicate with the prisoner, either by sending or by receiving mail, is grounded in the First Amendment. Therefore, the Court held, regulation of mail must further an important interest unrelated to the suppression of expression; regulation must be shown to further the substantial interests of security, order, and rehabilitation, and it must not be utilized simply to censor opinions or other expressions. Further, a restriction must be no greater than is necessary or essential to the protection of the particular government interest involved.

However, in subsequent cases, the Court found that neither prisoners nor newsmen had any affirmative First Amendment right to face-to-face interviews, when general public access to prisons was restricted and when there existed alternatives by which the news media could obtain information respecting prison policies and conditions.[13.5] Prison restrictions on such interviews do indeed implicate the First Amendment rights of prisoners, the Court held, but the justification for the restraint lay in the implementation of security arrangements, affected by the entry of persons into prisons, and the carrying out of rehabilitation objectives, affected by the phenomenon of the "big wheel," the exploitation of access to the news media by certain prisoners; alternatives to face-to-face interviews existed, such as mail and visitation with family, attorneys, clergy, and friends. The existence of alternatives and the presence of justifications for the restraint served to weigh the balance against the asserted First Amendment right, the Court held.[14.5]

While agreeing with a previous affirmation that "newsgathering is not without some First Amendment protection," [15.5] the Court denied that the First Amendment accorded newsmen any affirmative obligation on the part of government. "The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally." [16.5] Government's obligation is not to impair the freedom of journalists to seek out newsworthy information and not to restrain

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[13.5] *Pell* v. *Procunier*, 417 U.S. 817 (1974). Justices Douglas, Brennan, and Marshall dissented. Id., 836.

[14.5] Id., 829–835.

[15.5] *Branzburg* v. *Hayes*, 408 U.S. 665, 707 (1972), quoted in *Pell* v. *Procunier*, 417 U.S. 817, 833 (1974).

[16.5] Id., 834.

the publication of news. But it cannot be argued, the Court continued, "that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally." [17.5]

[17.5] Ibid. The holding was applied to federal prisons in *Saxbe* v. *Washington Post*, 417 U.S. 843 (1974). Dissenting, Justices Powell, Brennan, and Marshall argued that an important societal function of the First Amendment is to preserve free public discussion of governmental affairs, that the press' role was to make this discussion informed through providing the requisite information, and that the ban on face-to-face interviews unconstitutionally fettered this role of the press. Id. 850.

Governmental Regulation of Communications Industries

[P. 996, add to text following N. 5:]

Perhaps the outer boundary of the doctrine was reached in a five-to-four decision sustaining the application of a city ordinance banning employment discrimination on the basis of sex to bar sex-designated employment advertising in a newspaper.[1.5] Granting that speech does not lose its constitutional protection simply because it appears in a commercial context, Justice Powell for the Court found the placing of want-ads in newspapers to be "classic examples of commercial speech." "None expresses a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor does any of them criticize the Ordinance or the Commission's enforcement practices. Each is no more than a proposal of possible employment." [2.5] Thus, the First Amendment was not violated here because the ads "did no more than propose a commercial transaction," and the result was not altered by the limited amount of restriction upon the editorial judgment of the newspaper in deciding the lay-out of its advertising section.

[1.5] *Pittsburgh Press Co.* v. *Comm. on Human Relations*, 413 U.S. 376 (1973). See also *United States* v. *Hunter*, 459 F. 2d 205 (C.A. 4), *cert. den.*, 409 U.S. 934 (1972), *reh. den.*, 413 U.S. 923 (1973) (application of federal discrimination in housing law to newspaper ads).

[2.5] *Pittsburgh Press Co.* v. *Comm. on Human Relations*, 413 U.S. 376, 385 (1973). Dissenting, Justice Douglas disavowed the commercial speech doctrine, id., 397, while Justice Stewart argued it should be closely curbed, id., 400, and Chief Justice Burger and Justice Blackmun thought it inapplicable to the facts of the case. Id., 393, 404, Cf. *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974); *Spence* v. *Washington*, 418 U.S. 405, 413 n. 7 (1974), and id., 419, 421 (Justice Rehnquist dissenting).

[P. 1000, in text following N. 7, add:]

In *Columbia Broadcasting System* v. *Democratic National Committee*, [3.5] the Court rejected claims of parties that the broadcast net-

[3.5] 412 U.S. 94 (1973).

works were constitutionally required to sell to them broadcasting time for the presentation of views on controversial issues. The ruling thus terminated a broad drive to obtain that result but the fragmented nature of the Court's multiple opinions precludes a satisfactory evaluation of the constitutional implications of the case. Thus, four Justices in the majority appeared to have been swayed by their conclusions on the "state action" aspect of the case [4.5] and while two of them went on to discuss the First Amendment issue were the "state action" question decided differently, it is not clear what status this portion of their opinion has.[5.5] Two Justices adopted a finding of no state action for the apparent reason that they felt the contrary conclusion would have required a different result on First Amendment grounds.[6.5] Three Justices premised their conclusions on the finding that broadcaster refusal to sell time did not violate the First Amendment, although in the instance of two of the three the conclusion is not argued but drawn from the opinion of the Court in which the argument intermeshes statutory construction with constitutional considerations.[7.5] Two Justices would have found the sale of time to be mandated by the First Amendment.[8.5]

[4.5] On "state action," see *text, pp. 1460–1469;* in context of this case, see *infra, p. S99.* The four were Chief Justice Burger and Justice Rehnquist, in the opinion of the Court, id., 114–121, as did Justice Stewart, who wrote separately, id., 132, esp. 140–141, and Justice Douglas concurred separately. Id., 148, 150.

[5.5] Id., 121–132. The dissenters, id., 170, 171 (Justices Brennan and Marshall), considered this portion of the opinion of the Court dictum, but inasmuch as it was the only portion around which a majority of the Justices could agree, may *it* not be the holding? The discussion of the constitutional issue was intertwined as well with discussion of the broadcasters' obligation under the "public interest" standard of the Communications Act.

[6.5] Id., 132, 140–141 (Justice Stewart), 148, 150 (Justice Douglas).

[7.5] Id., 147 (Justices Blackmun and Powell). Justice White separately concurred, id., 146 in that part of the opinion of the Court reaching the First Amendment issue but also wrote, more sharply defining the discussion than the opinion of the Court, that the statutory and regulatory recognition of broadcaster freedom and discretion when combined with the fairness doctrine was consistent with the First Amendment.

[8.5] Id., 170, 182, 192 (Justices Brennan and Marshall).

[P. 1000, add to text following first full paragraph on page:]

Governmentally Compelled Right of Reply to Newspapers.— However divided it may have been in dealing with access to the broadcast media, the Court was unanimous in holding void under the First Amendment a state law that granted a political candidate a right to equal space to answer criticism and attacks on his record by a newspaper.[9.5] Granting that the number of newspapers had declined over

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[9.5] *Miami Herald Pub. Co.* v. *Tornillo,* 418 U.S. 241 (1974).

the years, that ownership had become concentrated, that new entries were prohibitively expensive, the Court agreed with proponents of the law that the problem of newspaper responsibility was a great one. But press responsibility, while desirable, "is not mandated by the Constitution," while freedom is. The compulsion exerted by government on a newspaper to print that which it would not otherwise print, "a compulsion to publish that which 'reason tells them should not be published,' " runs afoul of the free press clause.[10.5]

[10.5] Id., 256. The Court also adverted to the imposed costs of the compelled printing of replies but this seemed secondary to the quoted conclusion.

Government Restraint of Content of Expression

[P. 1006, in text following N. 3, add:]

In *Gertz* v. *Robert Welch, Inc.*[1.5] the Court set off on a new path of limiting recovery for defamation by private persons than that initially charted in *Rosenbloom* v. *Metromedia.*[2.5] Henceforth, persons who are neither public officials nor public figures may recover for the publication of defamatory falsehoods so long as state defamation law establishes a standard higher than strict liability, such as negligence; damages may not be presumed, however, but must be proved and punitive damages will be recoverable only upon the *Times* showing of "actual malice."

The Court's opinion by Justice Powell established competing constitutional considerations. On the one hand, imposition upon the press for liability for every mistatement would deter not only false speech but much truth as well when the possibility that the press might have to prove everything it prints would lead to self-censorship and the consequent deprivation of the public of its access to information. On the other hand, there is a legitimate state interest in compensating individuals for the harm inflicted on them by defamatory falsehoods. An individual's right to the protection of his own good name is, at bottom, but a reflection of our society's concept of the worth of the individual. Therefore, an accommodation must be reached. The *Times* rule had been a proper accommodation when public officials or public

[1.5] 418 U.S. 323 (1974).

[2.5] 403 U.S. 29 (1971). In *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967), the Court applied the *Times* rule to preclude recovery under a state privacy statute that permitted recovery for harm caused by exposure to public attention in any publication which contained factual inaccuracies, although not necessarily defamatory inaccuracies. See *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 335 n. 6, 348 (1974). The viability of the *Hill* ruling after *Gertz* is expected to be tested in *Cox Broadcasting Corp.* v. *Cohn,* 231 Ga. 60, 200 S. E. 2d 127 (1973), *juris postponed,* 415 U.S. 912 (1974), in which the invasion of privacy was through a truthful report.

figures were concerned, inasmuch as by their own efforts they had brought themselves into the public eye, had created a need in the public to information about them, and had at the same time attained an ability to counter defamatory falsehoods published about them. Private individuals are not in the same position and need greater protection. "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." [3.5] Some degree of fault must be shown then.

Generally, juries may award in tort substantial damages for presumed injury to reputation merely upon a showing of publication. But this discretion of juries has the potential to inhibit the exercise of freedom of the press and moreover permits juries to penalize unpopular opinion through the awarding of damages. Therefore, defamation plaintiffs who do not prove actual malice—that is, knowledge of falsity or reckless disregard for the truth—will be limited to compensation for actual provable injuries, such as out-of-pocket loss, impairment of reputation and standing, personal humiliation, and mental anguish and suffering. A plaintiff who proves actual malice will be entitled as well to collect punitive damages.[4.5]

[3.5] *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

[4.5] Id., 348–350. Justice Douglas would have held that the First Amendment precludes recovery for defamation against the media, id., 355, while Justice Brennan would have adhered to his opinion in *Rosenbloom*, applying the *Times* standard. Id., 361. Justice White, on the other hand, thought the Court went too far in constitutionalizing the law of defamation and had in effect immunized the media from accountability. Id., 369. Chief Justice Burger also dissented. Id., 354.

[P. 1009, add to text following N. 17:]

The Court has reiterated that a State may not punish the utterance of profane, or vulgar, opprobrious words simply because they are offensive; it may only punish the utterance of "fighting words" and that under a statute or ordinance narrowly drawn or construed to reach "fighting words," that is, "those words which by their very utterance inflict injury or tend to incite an immediate breach of the peace." [5.5]

[5.5] *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974). Justices Blackmun and Rehnquist and Chief Justice Burger dissented. Id., 136. See also the opinions of these Justices and of Justice Douglas in *Karlan* v. *City of Cincinnati*, 416 U.S. 924 (1974), and *Lucas* v. *Arkansas*, 416 U.S. 919 (1974) (remanding for reconsideration in the light of *Lewis*); and see *Hess* v. *Indiana*, 414 U.S. 105 (1973). *Papish* v. *Board of Curators*, 410 U.S. 667 (1973), held that a state university could not expel a student for using "indecent speech" in a campus newspaper.

[P. 1012, add to N. 5:]

For the Court's present Fourth Amendment standards, see *Heller* v. *New York*, 413 U.S. 483 (1973), and *Roaden* v. *Kentucky*, 413 U.S. 496 (1973). For a discussion of the *scienter* requirement, see *Hamling* v. *United States*, 418 U.S. 87 119–124 (1974).

[P. 1017, add to N. 25:]

Note the circumscribing of *Stanley* in *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49, 65–68 (1973).

[P. 1018, add to text immediately preceding "Speech Plus" section head:]

Pornography regulation and the limitations of the First Amendment upon it have been extensively and intensively considered in this period by the Court. The Court's approach has changed and it has formulated new standards, giving government, federal, state, and local, greater power than they previously possessed to outlaw the sale and dissemination of materials found to be pornographic. These governments do not have *carte blanche*, however, and it seems clear that the Court's docket is to regularly contain a staple of such cases.

At the end of the October 1971 Term, the Court requested argument on the question whether the display of sexually oriented films or of sexually oriented pictorial magazines, when surrounded by notice to the public of their nature and by reasonable protection against exposure to juveniles, was constitutionally protected.[6.5] By a five-to-four vote the following Term, the Court adhered to the principle established in *Roth* that obscene material is not protected by the First and Fourteenth Amendments.[7.5] Chief Justice Burger for the Court observed that the States have wider interests than protecting juveniles and unwilling adults from exposure to pornography; legitimate state interests, effectuated through the exercise of the police power, exist in protecting and improving the quality of life and the total community environment, in improving the tone of commerce in the cities, and in protecting public safety. It matters not that the States may be acting on the basis of unverifiable assumptions in arriving at the conclusion to suppress the trade in pornography; the Constitution does not require in the context of the trade in ideas that governmental courses of action be subject to empirical verification any more than it does in other fields. Neither is there some constitutionally prescribed concept of *laissez faire*, no concept of privacy, no right, no imposition of

[6.5] *Paris Adult Theatre* v. *Slaton*, 408 U.S. 921 (1972); *Alexander* v. *Virginia*, 408 U.S. 921 (1972).

[7.5] *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49 (1973).

Millsean "free will" to curb governmental efforts to suppress pornography.[8.5]

In *Miller* v. *California*,[9.5] the Court then undertook to enunciate standards by which unprotected pornographic materials were to be identified. Because of the inherent dangers in undertaking to regulate any form of expression, laws to regulate pornography must be carefully limited; their scope is to be confined "to works which depict or describe sexual conduct." That conduct must be specifically defined by the applicable statute, whether as written or as authoritatively construed by the courts.[10.5] The law "must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." [11.5] The standard that a work must be "utterly without redeeming social value" before it may be suppressed was disavowed and discarded. In determining whether material appeals to a prurient interest or is patently offensive, the trier of fact, whether a judge or a jury, is not bound by a hypothetical national standard but may apply the local community standard where the trier of the fact sits. Pruri-

[8.5] Id., 57, 60–62, 63–64, 65–68. Delivering the principal dissent, Justice Brennan argued that the Court's *Roth* approach allowing the suppression of pornography was a failure, that the Court had not and could not formulate standards by which protected materials could be distinguished from unprotected materials, and that the First Amendment had been denigrated through the exposure of numerous persons to punishment for the dissemination of materials that fell close to one side of the line rather than the other but more basically by deterrence to protected expression caused by the uncertainty. Id., 73. "I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents". Id., 113. Justices Stewart and Marshall joined this opinion; Justice Douglas dissented separately, adhering to the view that the First Amendment absolutely protected all expression. Id., 70.

[9.5] 413 U.S. 15 (1973). The same standards were held applicable to federal laws. *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123 (1973) (importation of pornography); *United States* v. *Orito*, 413 U.S. 139 (1973) (transportation of pornography in interstate commerce); *Hamling* v. *United States*, 418 U.S. 87 (1974) (use of the mails).

[10.5] *Miller* v. *California*, 413 U.S. 15, 24 (1973). The Court stands ready to import into the general phrasings of federal statutes the standards it has now formulated. *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 130 n. 7 (1973) (Court is prepared to construe statute proscribing materials that are "obscene," "lewd," "lascivious," "filthy," "indecent," and "immoral" as limited to the types of "hard-core" pornography reachable under the *Miller* standards); *Hamling* v. *United States*, 418 U.S. 87, 110–116 (1974).

[11.5] *Miller* v. *California*, 413 U.S. 15, 24 (1973).

ent interest and patent offensiveness, the Court indicated, "are essentially questions of fact." [12.5] The Court reiterated that it was not permitting an unlimited degree of suppression of materials. Only "hard core" materials were to be deemed without the protection of the First Amendment; its idea of the content of "hard core" pornography was revealed in its example of the types of conduct that could not be portrayed: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." [13.5] Neither did the portrayal have to be limited to pictorial representation; books containing only descriptive language, no pictures, were subject to suppression under the standards.[14.5]

First Amendment values, the Court stressed in *Miller*, "are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." [15.5] But the Court had conferred on juries as triers of fact determination whether something was "patently offensive" as a question essentially of fact based upon their understanding of community standards. Did not this virtually immunize these questions from appellate review? In *Jenkins* v. *Georgia*,[16.5] the Court, while adhering to the *Miller* standards, stated that "juries [do not] have unbridled discretion in determining what is 'patently offensive.' " *Miller* was intended to make clear that only "hard-core" materials could be suppressed and this concept and the Court's descriptive itemization of some types of hard-core materials were "intended to fix substantive constitutional limitations,

[12.5] Id., 30–34. "A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law." *Hamling* v. *United States*, 418 U.S. 87, 104 (1974). The holding does not compel any particular circumscribed area to be used as a "community". In federal cases, it will probably be the judicial district from which the jurors are drawn. Id., 105–106. Indeed, the jurors may be instructed to apply "community standards" without any definition being given of the "community." *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974).

[13.5] *Miller* v. *California*, 413 U.S. 15, 25–28 (1973). Quoting *Miller's* language in *Hamling* v. *United States*, 418 U.S. 87, 114 (1974), the Court reiterated that it was only "hard-core" material that was unprotected. "While the particular descriptions there contained were not intended to be exhaustive, they clearly indicate that there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is 'patently offensive' within the meaning of the obscenity test set forth in the *Miller* cases."

[14.5] *Kaplan* v. *California*, 413 U.S. 115 (1973).

[15.5] *Miller* v. *California*, 413 U.S. 15, 25 (1973).

[16.5] 418 U.S. 153 (1974).

deriving from the First Amendment, on the type of material subject to such a determination." The Court's own viewing of the motion picture in question convinced it that "[n]othing in the movie falls within either of the two examples given in *Miller* of material which may constitutionally be found to meet the 'patently offensive' element of those standards, nor is there anything sufficiently similar to such material to justify similar treatment." [17.5] But in a companion case, the Court found that a jury determination of obscenity "was supported by the evidence and consistent with" the standards.[18.5]

[17.5] Id., 161. The dissenters in *Slaton–Miller* continued to insist on their formulation, observing that the Court's decision required the Court to make its own determination of legal obscenity in the cases coming before it, thus miring the Court deeper into the issue. Id., 162. But see *J–R Distributors* v. *Washington*, 418 U.S. 949 (1974) (Justice White concurring in a denial of a petition for certiorari).

[18.5] *Hamling* v. *United States*, 418 U.S. 87 (1974).

Speech Plus

[P. 1020, following N. 15 in text, add:]

However, a recent case, in which there was no majority of the Court, held that a refusal of a city transit system to sell advertising space on its buses for political advertising although it allowed other types of advertising violated neither the First nor the Fourteenth Amendment. Under the circumstances, the buses were not a "public forum." [1.5]

[1.5] *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974). Justices Blackmun, White, Rehnquist, and Chief Justice Burger held the advertising policy of the transit system is simply a part of a commercial venture and that the city's rational distinction between the kind of advertising it will accept and the kind it will not is permissible. Justice Douglas thought political candidates had no constitutional right to force their views on a captive audience. Id., 305. Justices Brennan, Stewart, Marshall, and Powell were of the view that the buses were a public forum and that distinguishing on the basis of the kind of message advertised was impermissible. Id., 308.

[P. 1030, in text following N. 23, add:]

Two flag desecration cases were decided by the Court in a manner that indicated a beginning of an effort to resolve the standards of First Amendment protection of "symbolic conduct." In *Smith* v. *Goguen*,[2.5] the conviction of one for wearing a small United States flag sewn to the seat of his trousers under a statute punishing anyone who "publicly . . . treats contemptuously the flag of the United States . . ." was set aside because that portion of the statute was void for vagueness. "The language at issue is void for vagueness as applied to Goguen

[2.5] 415 U.S. 566 (1974).

because it subjected him to criminal liability under a standard so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag." [3.5] Justice White thought the statute not vague but concurred on First Amendment grounds; in his view, government could properly legislate against acts expressive of ideas or opinions involving the flag when the object was to protect the physical integrity of the flag or to protect against acts interfering with the proper use of the flag.[4.5] The First Amendment was the basis for reversal in *Spence* v. *Washington*,[5.5] in which a conviction under a statute punishing the display of a United States flag to which something is attached or super-imposed was set aside; Spence had hung his flag from his apartment window upside down with a peace symbol taped to the front and back. The act, the Court thought, was a form of communication, and because of the nature of the act, the factual context and environment in which it was undertaken, the Court held it to be protected. The factual context included the fact that the flag was privately owned, that it was displayed on private property, and that there was no danger of breach of the peace. The nature of the act was that it was intended to express an idea and it did so without damaging the flag. The Court assumed that the State had a valid interest in preserving the flag as a national symbol but whether this interest extends beyond protecting the physical integrity of the flag is unclear.[6.5] In sum, the Court's opinion is so based upon the particularities of Spence's conduct that the guidance afforded for other cases is highly speculative.[7.5]

[3.5] Id., 578. The holding was thus founded on due process rather than the First Amendment.

[4.5] Id., 583. Dissenting, Justice Rehnquist and Blackmun and Chief Justice Burger thought government could protect the integrity of the flag, as by burning or tearing it, and could protect its status as a symbol from acts which abused the symbol, although not from verbal contempt. Id., 591, 592.

[5.5] 418 U.S. 405 (1974).

[6.5] Id., 408–411, 412–413. Justice Blackmun concurred in the result and Justices Rehnquist and White and Chief Justice Burger dissented. Id., 416. They would permit government to prevent the use of the flag as "a background for communication" as a way of preserving the character of the flag.

[7.5] Subsequently, the Court vacated, over the dissents of Chief Justice Burger and Justices White, Blackmun, and Rehnquist, two convictions for burning flags and sent them back for reconsideration in the light of *Goguen* and *Spence*. *Sutherland* v. *Illinois*, 418 U.S. 907 (1974); *Farrell* v. *Iowa*, 418 U.S. 907 (1974). The Court did, however, dismiss, "for want of a substantial federal question," an appeal from a conviction under a flag desecration statute of one who, with no apparent intent to communicate but in the course of "horseplay", blew his nose on a flag, simulated masturbation on it, and finally burned it. *Van Slyke* v. *Texas*, 418 U.S. 907 (1974).

AMENDMENT 4—SEARCHES AND SEIZURES

Scope

[P. 1045, add to N. 19:]

The Court remains closely divided on the degree to which the "reasonableness" of a search is bounded by the warrant clause. Four Justices adhere to the view that except in narrowly circumscribed circumstances a warrant is necessary, *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973) (Justices Stewart, Douglas, Brennan, and Marshall), while four other Justices would place greater emphasis upon questions of reasonableness without necessary regard to the warrant requirement. Id., 285 (Justices White, Blackmun, and Rehnquist, and Chief Justice Burger). Justice Powell appears to agree generally with the former group of Justices, id., 275, but he has joined opinions taking the other view, although in each instance the result was supportable upon other considerations. *Cady* v. *Dombrowski*, 413 U.S. 433 (1973); *United States* v. *Edwards*, 415 U.S. 800 (1974).

In *Almeida-Sanchez*, *supra*, 275, Justice Powell advocated authorization of warrants issued by neutral magistrates empowering police and immigration officials to conduct roving searches of automobiles in areas near the Nation's borders upon a concept of probable cause that did not relate to knowledge about a specific automobile but based rather on the incidence of use of the area's roads for smuggling in aliens, proximity to the border, and the probable degree of interference with the rights of innocent persons. The idea is that the procedure would permit effectuation of legitimate governmental goals while the warrants and judicial control over them would protect Fourth Amendment interests. A majority of the Court apparently concurs. Id., 270 n. 3, 288.

Searches and Seizures Pursuant to Warrant

[P. 1056, following N. 9 in text, add:]

Seizure of materials arguably protected by the First Amendment, as are books and films, is a form of prior restraint that requires observance strictly of the Fourth Amendment. Thus, the seizure of a film without a warrant issued by a neutral magistrate upon the conclusions of the police officer is invalid; seizure cannot be justified as incidental to arrest, inasmuch as the determination of obscenity may not be made by the officer himself.[1.5] However, no pre-seizure adversary hearing is required. In the case of a film, when it is seized in order to preserve it as evidence pursuant to a warrant issued after a determination of probable cause by a neutral magistrate, with an adversary hearing assured to provide a prompt judicial determination of the obscenity issue, the seizure is constitutionally permissible. Until there is a judi-

[1.5] *Roaden* v. *Kentucky*, 413 U.S. 496 (1973).

cial determination of obscenity, the film may continue to be exhibited and if no other copy is available either a copy of it must be made from the seized film or the film itself must be returned.[2.5]

[2.5] *Heller* v. *New York*, 413 U.S. 483 (1973).

[P. 1057, add to N. 18:]

Cupp v. *Murphy*, 412 U.S. 291 (1973), upheld the warrantless taking of scrapings from defendant's fingernails at the stationhouse to which he had come voluntarily and while he was not arrested. The Court held that the very limited intrusion was undertaken to preserve highly evanescent evidence and was within an exception to the Fourth Amendment.

Grand jury subpoenas compelling certain parties to produce voice and handwriting exemplars were held not to be governed by the Fourth Amendment. There is no reasonable expectation of privacy in those areas. *United States* v. *Dionisio*, 410 U.S. 1 (1973); *United States* v. *Mara*, 410 U.S. 19 (1973).

[P. 1058, add to N. 25:]

But see *Couch* v. *United States*, 409 U.S. 322 (1973).

[P. 1059, add to N. 1:]

See *Gooding* v. *United States*, 416 U.S. 430 (1974).

Valid Searches and Seizures Without Warrants

[P. 1062, in text following N. 15, add:]

However, the permissibility of a thorough search of the person of one arrested for a traffic offense, in the course of which heroin was discovered, has recently divided the Court.[3.5] The lower court and the dissenting Justices had taken the view that inasmuch as exceptions to the warrant requirement were to be narrowly construed, the person of the arrestee for a crime for which no evidence could be discovered could be thoroughly searched only upon a reasonable suspicion that the individual might be armed, a fact that ordinarily could be determined by a frisk. But the Court held that a custodial arrest of a suspect based upon probable cause is a reasonable intrusion under the Fourth Amendment and a search incident to the arrest requires no additional justification.[4.5]

[3.5] *United States* v. *Robinson*, 414 U.S. 218 (1973). Justices Marshall, Douglas, and Brennan dissented. Id., 238.

[4.5] The officer was required under applicable regulations to arrest Robinson, but in *Gustafson* v. *Florida*, 414 U.S. 260 (1973), the Court adhered to its rule even though the arrest was for an offense for which a citation would have normally been issued, the lawfulness of the arrest not having been challenged. Id., 266 (Justice Stewart concurring).

In *United States* v. *Edwards*, 415 U.S. 800 (1974), the warrantless seizure for examination of defendant's clothing several hours following the time he had been arrested and placed in a cell was upheld as incident to the arrest, the delay being found not unreasonable because substitute clothing was not available for some time.

[P. 1064, add to N. 24:]

The Court continues to be closely divided. *Supra, p. S62.*

[P. 1064, add to N. 25:]

See *Cardwell* v. *Lewis*, 417 U.S. 583, 591 n. 7, 599 n. 4 (1974). But see *United States* v. *Edwards*, 415 U.S. 800 (1974).

[P. 1064, in text following N. 5, add:]

Automobile searches continue to create controversy within the Court. The Court voided the conviction of one obtained on evidence found in his automobile in a warrantless search without probable cause as a result of roving checks of automobiles in areas near the Nation's borders. The automobile exception to the warrant clause, the Court said, requires the existence of probable cause.[3.5] In an opinion rendered the same day, the Court found no Fourth Amendment violation when, following an automobile accident by an off-duty out-of-state policeman and the towing of the wrecked car to a garage, the police made an inspection of the car to obtain the policeman's revolver, which they thought was in the car, in order to make sure it was not lost or stolen, and found evidence incriminating of a crime not yet discovered. The rationale is that evidence obtained in the course of an administrative inspection or search not carried out for purposes of finding evidence of a crime is admissible.[4.5] In *Cardwell* v. *Lewis*, the Court was evenly divided upon the propriety of the warrantless seizure of defendant's automobile from a public parking lot several hours after his arrest, its transportation to a police impoundment lot, and the taking of tire casts and exterior paint scrapings.[5.5]

[3.5] *Almeida-Sanchez* v. *United States*, 413 U.S. 266, (1973) (Justices Stewart, Douglas, Brennan, and Marshall), and id., 275 (Justice Powell). The dissenters would have found the search reasonable under the circumstances. Id., 285.

[4.5] *Cady* v. *Dombrowski*, 413 U.S. 433 (1973). The opinion of the Court hints that the conduct of local police with respect to automobiles should be viewed with greater judicial deference than is the conduct of federal officials. Id., 440–441. Justices Brennan, Douglas, Stewart, and Marshall dissented. Id., 450.

[5.5] 417 U.S. 583 (1974). Four Justices would have sustained the seizure on the grounds that no search took place because the interior of the car was not searched, or because an automobile being involved the expectation of privacy was less than in other situations and had not therefore been invaded, or that exigent circumstances justified the warrantless seizure. (Justices Blackmun, White, Rehnquist, and Chief Justice Burger). Justices Stewart, Douglas, Brennan, and Marshall dissented, arguing that in the absence of a warrant and absent the few exceptions to the warrant clause the seizure was unconstitutional. Id., 596. Justice Powell concurred with the former four on other grounds. Ibid.

[P. 1065, following N. 8 in text, add:]

In *Schneckloth* v. *Bustamonte*,[6.5] the Court dealt for the first time with the standards for determining the voluntariness of consent to a warrantless search. Adopting the standards of voluntariness utilized by it in the confession cases prior to *Miranda* v. *Arizona*,[7.5] the Court held that reviewing courts must determine on the basis of the totality of all the circumstances whether consent had been voluntarily given or had been coerced. It rejected the contention that knowledge of the right to refuse consent was essential to the issue of voluntariness, so that government would have had to prove such knowledge or the police in asking for consent would have had to give warnings similar to those required in *Miranda* to acquaint a person with his rights. The Court refused to equate "consent" with "waiver", which would have brought into play the principle that a "waiver" of constitutional rights must be based upon "an intentional relinquishment or abandonment of a known right or privilege." [8.5]

[6.5] 412 U.S. 218 (1973). Justices Douglas, Brennan, and Marshall, dissenting, would have required a showing of awareness of the right to refuse to establish the validity of consent. Id., 275, 276, 277.

But see *United States* v. *Matlock*, 415 U.S. 164 (1974) (dealing with the standards for determining whether the woman with whom defendant was living had authority to consent to the search of a commonly-shared bedroom).

[7.5] 384 U.S. 436 (1966). See *text, pp. 1122–1134.*

[8.5] 412 U.S. 235–246, quoting from *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). See *text, p. 1217. Bustamonte* limits *Johnson* v. *Zerbst* to a waiver of those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial. The Fourth Amendment, the Court said, is aimed at preserving other values for which the waiver doctrine is inappropriate of application.

[P. 1066, add to N. 10:]

The Court in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), approved the principle of border searches absent warrants and probable cause as a condition to the privilege of crossing the Nation's borders, but it held that the warrantless stopping of a defendant's car without probable cause on a highway at that point 20 air miles from the border could not be justified under the border search exception. Justices White, Blackmun, Rehnquist, and Chief Justice Burger would have found the search reasonable upon the basis of congressional approval of such roving searches as the only effective means to police border smuggling. Id., 285. For Justice Powell's concurring suggestion, see *supra, p. S62.*

[P. 1066, add to N. 11:]

See *Air Pollution Variance Bd.* v. *Western Alfalfa Corp.* 416 U.S. 86 (1974).

Electronic Surveillance

[P. 1072, add to N. 19:]

Interpreting the statute but reaching no constitutional questions, see *United States* v. *Giordano*, 416 U.S. 505 (1974); *United States* v. *Chavez*, 416 U.S. 562 (1974); *United States* v. *Kahn*, 415 U.S. 143 (1974).

Exclusionary Rule

[P. 1082, add to N. 16:]

Thus, in *United States* v. *Calandra*, 414 U.S. 338 (1974), holding that a witness summoned to appear and testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure, the Court stressed the deterrence rationale to the exclusion of others, denied that exclusion of the evidence in the circumstances of this case would have any substantial deterrent effect, asserted that inasmuch as the witness' privacy had already been invaded it was not further damaged by the inquiry, and that the value of the grand jury inquiry outweighed any claim to the operation of the rule in these circumstances. Justices Brennan, Douglas, and Marshall dissented. Id., 355.

Standing

[P. 1085, add to N. 8:]

In *Brown* v. *United States*, 411 U.S. 223 (1973), the Court held that defendants had no standing to contest a search where they "(a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." Id., 229.

[P. 1085, add to N. 10:]

See *Brown* v. *United States*, 411 U.S. 223, 227–229 (1973).

AMENDMENT 5—RIGHTS OF PERSONS

INDICTMENT BY GRAND JURY

[P. 1090, in text following N. 5, add:]

The investigatory powers of grand juries were substantially extended by the Court in recent decisions. It was held that the exclusionary rule was inapplicable in grand jury proceedings with the result that a witness called before a grand jury could be questioned on the basis of knowledge obtained through the use of illegally-seized evidence.[1.5] In thus allowing the use of evidence obtained in violation of the Fourth Amendment, the Court nonetheless restated the principle that, while free of many rules of evidence that bind trial courts, grand juries are not unrestrained by constitutional considerations.[2.5] Of greater significance were two cases in which the Court held the Fourth Amendment to be inapplicable to grand jury subpoenas requiring named parties to give voice exemplars and handwriting samples to the grand jury for identification purposes.[3.5] According to the Court, the issue turned upon a two-tiered analysis—"whether either the initial compulsion of the person to appear before the grand jury, or the subsequent directive to make a voice recording is an unreasonable 'seizure' within the meaning of the Fourth Amendment."[4.5] First, a subpoena to appear was held not to be a seizure, because it entailed significantly less social and personal affront to one than did an arrest

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[1.5] *United States* v. *Calandra*, 414 U.S. 338 (1974). Justices Brennan, Douglas, and Marshall dissented. Id., 355.

[2.5] "Of course, the grand jury's subpoena is not unlimited. It may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law. . . . Although, for example, an indictment based on evidence obtained in violation of a defendant's Fifth Amendment privilege is nevertheless valid . . . the grand jury may not force a witness to answer questions in violation of that constitutional guarantee. . . . Similarly, a grand jury may not compel a person to produce books and papers that would incriminate him. . . . The grand jury is also without power to invade a legitimate privacy interest protected by the Fourth Amendment. A grand jury's subpoena duces tecum will be disallowed if it is 'far too sweeping in its terms to be regarded as reasonable under the Fourth Amendment.' *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906). Judicial supervision is properly exercised in such cases to prevent the wrong before it occurs." Id., 346. See also, *United States* v. *Dionisio*, 410 U.S. 1, 11–12 (1973).

[3.5] *United States* v. *Dionisio*, 410 U.S. 1 (1973); *United States* v. *Mara*, 410 U.S. 19 (1973). Justices Douglas, Brennan, and Marshall dissented. Id., 22, 23, 31.

[4.5] Id., 9.

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or an investigative stop and because every citizen has an obligation, which may be onerous at times, to appear and give whatever aid he may to a grand jury.[5.5] Second, the directive to make a voice recording or to produce handwriting samples did not bring the Fourth Amendment into play because no one has any expectation of privacy in the characteristics of either his voice or his handwriting.[6.5] Inasmuch as the Fourth Amendment was inapplicable, there was no necessity for the government to make a preliminary showing of the reasonableness of the grand jury requests.

[5.5] Id., 9–13.

[6.5] Id., 13–15. The privacy rationale proceeds from *Katz* v. *United States*, 389 U.S. 347 (1969).

Double Jeopardy

[P. 1095, add to N. 12:]

Illinois v. *Somerville*, 410 U.S. 458 (1973), makes clear the rule is applicable to state trials for determining when jeopardy has attached.

[P. 1096, in text following N. 19, add:]

After defendant's case was called to trial and a jury empaneled, it was discovered that the indictment was incurably defective, which would lead to a reversal should defendant be convicted. Holding that retrial was not barred following the trial court's declaration of a mistrial under these circumstances, the Court enunciated general standards for the "manifest necessity" exception. "A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve 'the ends of public justice' to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court." [1.5] The Court cautioned that utilization of a procedure that would lend itself to "prosecutorial manipulation" would present a different question.

[1.5] *Illinois* v. *Somerville*, 410 U.S. 458, 464 (1973). Justices White, Douglas, Brennan, and Marshall dissented. Id., 471, 477.

[P. 1099, add to N. 16:]

The principle is reaffirmed in *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 23–24 (1973).

[P. 1105, add to N. 18:]

Justices Brennan, Douglas, and Marshall continue to argue for adoption of the "same transaction" test but the Court has so far refused to review a case presenting the issue. *Moton* v. *Swenson*, 417 U.S. 957 (1974), and cases cited therein.

Self-Incrimination

[P. 1113, add to N. 10:]

Gardner and *Garrity* were approved and reaffirmed in *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973), holding unconstitutional state statutes requiring the disqualification for five years of contractors doing business with the State if at any time they refused to waive immunity and answer questions respecting their transactions with the State. The State can require employees or contractors to respond to inquiries, but only if it offers them immunity sufficient to supplant their privilege against self-incrimination.

Privilege Against Self-Incrimination

[P. 1134, following first full paragraph on page, add:]

In *Michigan* v. *Tucker*,[1.5] the Court was confronted with the question whether *Miranda* required the exclusion of the testimony of a witness when the witness was discovered because of the statement of defendant in interrogation following an inadequate *Miranda* warning. The interrogation had taken place prior to *Miranda* but the trial had followed the decision in *Miranda*, leading to the exclusion of defendant's statement but not of the testimony of the witness. The actual holding of the Court and the concurrence of two Justices turned upon the fact that the interrogation preceded *Miranda* and that warnings had been given although not the full *Miranda* warning; [2.5] thus, in some respects, the decision is in the line of retroactivity cases. But of great possible significance was the action of the Court in consid-

[1.5] 417 U.S. 433 (1974).

[2.5] Justices Rehnquist, Stewart, Blackmun, Powell, and Chief Justice Burger joined the opinion of the Court. Justices Brennan and Marshall concurred on the ground that since *Miranda* had not involved the question of the admissibility of the "fruits" of evidence obtained through *Miranda* violations there was no retroactive application to be made. Id., 453. Justice Stewart noted he could have joined this opinion as well. Ibid. Justice White continued to think *Miranda* was wrongfully decided but concurred because he did not think "fruits" should be excluded although discovered as a result of a *Miranda* violation, id., 460, and Justice Douglas dissented. Id., 461.

ering "whether the police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination or whether it instead violated only the prophylactic rules developed to protect that right." [3.5] Finding that defendant's statement had not been coerced nor otherwise procured in violation of his privilege, the Court found that good-faith, inadvertent error in not fully complying with the "prophylactic" *Miranda* rules did not require exclusion of the testimony, because the error preceded *Miranda*, because exclusion would not deter wrongful conduct, and because admission would not implicate the trial court in the use of possibly untrustworthy evidence.[4.5] Obviously, division of the constitutional question in this fashion permits courts a considerable degree of flexibility to apply or not to apply the exclusionary rule previously thought to be fairly rigid under *Miranda*.

[3.5] Id., 439.

[4.5] Id., 446–452.

[P. 1136, add to N. 7:]

On the sufficiency of state court determinations, see *Swenson* v *Stidham*, 409 U.S. 224 (1972); *La Vallee* v. *Delle Rose*, 410 U.S. 690 (1973).

Due Process: Procedural

[P. 1145, add to N. 24:]

But see *Arnett* v. *Kennedy*, 416 U.S. 134 (1974).

[P. 1156, add to N. 2:]

See *Parker* v. *Levy*, 417 U.S. 733 (1974), for analysis of vagueness standards in the defining of crimes in the military.

Due Process: Substantive

[P. 1164, add to N. 14:]

It seems clear that the two-tier standards apply in federal "equal protection" cases. Cf. *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

[P. 1165, in text following N. 20, add:]

Held violative of the equal protection standards of the due process clause were a provision of military law which distinguished between men and women for no reason other than administrative convenience,[1.5] a provision of the Social Security law that individiously discriminated against illegitimate children,[2.5] and a section of the food stamp program that rendered ineligible for food stamps any household

[1.5] *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

[2.5] *Jiminez* v. *Weinberger*, 417 U.S. 628 (1974).

including a member over 18 years of age who has been claimed as a tax dependent by a taxpayer who has been claimed as a tax dependent by a taxpayer who is not eligible for the stamps.[3.5] On the other hand, a veterans' law which extended certain educational benefits to all veterans who had served "on active duty" and thereby excluded conscientious objectors from eligibility was held to be sustainable, it being rational for Congress to have determined that the disruption caused by military service was quantitatively and qualitatively different from that caused by alternative service and for Congress to have so provided to make military service more attractive.[4.5] A statutory provision of $1 per diem subsistence for incarcerated witnesses before trial while witnesses merely required to attend trial are provided $20 for each day's attendance and time coming and going was sustained on the basis that the Government bore the costs of confinement and the subsistence of the incarcerated witnesses.[5.5]

[3.5] *Department of Agriculture v. Murry*, 413 U.S. 508 (1973). See also *Dept. of Agriculture* v. *Moreno*, 413 U.S. 528 (1973), holding unconstitutional under the due process clause under the "irrebutable presumption" doctrine of another food stamp section excluding from participation any household containing an individual unrelated to any other member of the household.

[4.5] *Johnson* v. *Robison*, 415 U.S. 361 (1974).

[5.5] *Hurtado* v. *United States*, 410 U.S. 578 (1973). See also *Marshall* v. *United States*, 414 U.S. 417 (1974) (exclusion of persons convicted of two or more prior felonies from drug rehabilitation program is rationally justified).

NATIONAL EMINENT DOMAIN POWER—Just Compensation

[P. 1184, following N. 9, in text, add:]

Illustrative of the difficulties in applying the fair market standard of just compensation are two cases in which the Court on five-to-four votes awarded compensation in one and denied it in the other.[1.5] Held entitled to compensation for the value of improvements on leased property for the life of the improvements and not simply for the remainder of the term of the lease was a company that, while its lease had no renewal option, had occupied the land since 1919 and that had every expectancy of continued occupancy under a new lease. Just compensation, the Court said, required taking into account the possibility that the lease would be renewed, inasmuch as a willing buyer and a willing seller would certainly have placed a value on the possi-

[1.5] *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470 (1973); *United States* v. *Fuller*, 409 U.S. 488 (1973). For compensation in both cases were Justices Powell, Douglas, Brennan, and Marshall; opposing compensation in both cases were Justices Rehnquist, White, and Blackmun, and Chief Justice Burger. Justice Stewart made the majority in both cases.

biity.[2.5] However, when the Federal Government condemned privately owned grazing land of a rancher who had leased adjacent federally-owned grazing land, it was held that the compensation owed need not include the value attributable to the proximity to the federal land, although if the adjacent land had been privately owned a fair market value standard would have required consideration of the potential use of the private land with the neighboring land, inasmuch as it is the general rule that government need not pay for taking value it itself creates.[3.5]

[2.5] *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470 (1973). The dissent argued that since upon expiration of the lease only salvage value of the improvements could be claimed by the lessee, just compensation should be limited to that salvage value. Id., 480.

[3.5] *United States* v. *Fuller*, 409 U.S. 488 (1973). The dissent argued that the principle denying compensation for governmentally-created value should apply only when the Government was in fact acting in the use of its own property; here the Government was acting only as a condemnor. Id., 494.

AMENDMENT 6—RIGHTS OF ACCUSED

Speedy Trial

[P. 1199, add to N. 17:]

Dismissal, the Court has held, is the only possible remedy for a violation of the right to a speedy trial. *Strunk* v. *United States*, 412 U.S. 434 (1973).

Impartial Jury

[P. 1208, add to N. 16:]

See also *Ham* v. *South Carolina*, 409 U.S. 524 (1973).

Confrontation

[P. 1212, add to N. 13:]

In *Davis* v. *Alaska*, 415 U.S. 308 (1974), the Court held that a state law prohibiting disclosure of the identity of juvenile offenders could not be applied to preclude cross-examination of a witness about his juvenile record when the object of the cross-examination was to allege possible bias on the part of the witness affecting his testimony about defendant.

Assistance of Counsel

[P. 1225, in text following N. 17, add:]

In *United States* v. *Ash*,[1.5] the Court redefined and modified its "critical stage" analysis by which it determines when the assistance of counsel is required for an indicted defendant prior to trial. According to the Court, the "core purpose" of the guarantee of counsel is to assure assistance at trial "when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." But assistance would be less than meaningful in the light of developments in criminal investigation and procedure if it were limited to the formal trial itself; therefore, counsel is compelled at "pretrial events that might appropriately be considered to be parts of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert

[1.5] 413 U.S. 300 (1973). Justices Brennan, Douglas, and Marshall dissented. Id., 326.

adversary, or by both." [2.5] Therefore, unless at the pretrial stage there was involved the physical presence of the accused at a trial-like confrontation at which the accused requires the guiding hand of counsel, the Sixth Amendment does not guarantee the assistance of counsel.

Since the defendant was not present when witnesses to the crime viewed photographs of possible guilty parties, since therefore there was no trial-like confrontation, and since the possibilities of abuse in a photographic display are discoverable and reconstructable at trial by an examination of witnesses, an indicted defendant is not entitled to have his counsel present at such a display.[3.5]

[2.5] Id., 309–310, 312–313. Justice Stewart, concurring on other grounds, rejected this analysis, id., 321, as did the three dissenters. Id., 326, 338–344. "The fundamental premise underlying *all* of this Court's decisions holding the right to counsel applicable at 'critical' pretrial proceedings, is that a 'stage' of the prosecution must be deemed 'critical' for the purposes of the Sixth Amendment if it is one at which the presence of counsel is necessary 'to protect the fairness of *the trial itself*.' " Id., 339 (Justice Brennan dissenting).

[3.5] Id., 317–321. On the due process standards of identification procedure, see *infra*, *S94*.

AMENDMENT 7—CIVIL JURY

[P. 1232, following N. 10 in text, add:]

In *Colgrove* v. *Battin*,[1.5] the Court by a five-to-four vote held that rules adopted in a federal district court authorizing civil juries composed of six persons were permissible under the Seventh Amendment and congressional enactments. By the reference in the Amendment to the "common law," the Court thought, "the Framers of the Seventh Amendment were concerned with preserving the *right* of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury." [2.5]

[1.5] 413 U.S. 149 (1973). Justices Marshall and Stewart dissented on constitutional and statutory grounds, id., 166, while Justices Douglas and Powell relied only on statutory grounds without reaching the constitutional issue. Id., 165, 188.

[2.5] Id., 155–156. The Court did not consider what number less than six, if any, would fail to satisfy the Amendment's requirements. "What is required for a 'jury' is a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross section of the community. . . . It is undoubtedly true that at some point the number becomes too small to accomplish these goals, . . ." Id., 160 n. 16.

[P. 1233, add to N. 18:]

See also *Melancon* v. *McKeithen*, 345 F. Supp. 1025 (D.C.E.D.La.), *aff'd per curiam*, 409 U.S. 943 (1972); *Alexander* v. *Virginia*, 413 U.S. 836 (1973).

[P. 1234, following N. 2 in text, add:]

Illustrative of the Court's course of decision on this subject are two unanimous decisions holding that civil juries were required in a suit by a landlord to recover possession of real property from a tenant allegedly behind on rent and in a suit for damages for alleged racial discrimination in the rental of housing in violation of federal law. In the former case, the Court reasoned that its Seventh Amendment precedents "require[ed] trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action at equity or admiralty." [3.5] The statutory cause of action, the Court found, had several counterparts in the common law, all of which involved a right to trial by jury. In the latter case, the plaintiff had

[3.5] *Pernell* v. *Southall Realty*, 416 U.S. 363 (1974).

argued that the Amendment was inapplicable to new causes of action created by congressional action, but the Court disagreed. "The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." [4.5]

[4.5] *Curtis* v. *Loether*, 415 U.S. 189, 194 (1974). "A damage action under the statute sounds basically in tort—the statute merely defines a new legal duty and authorizes the courts to compensate a plaintiff for the injury caused by the defendants' wrongful breach. . . . [T]his cause of action is analogous to a number of tort actions recognized at common law." Id., 195.

AMENDMENT 11—SUITS AGAINST STATES

[P. 1277, add to N. 22:]

Moor v. *County of Alameda*, 411 U.S. 693 (1973), affirming the ruling of the Court of Appeals, held that counties as political subdivisions of a State were not "persons" within the meaning of 42 U.S.C. § 1983 and were therefore not suable for damages under that statute, regardless of their amenability to suit under state law. The principle was similarly held to extend to actions for equitable relief in *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973). *Carter* v. *Carlson*, also cited in the Note, was reversed in *District of Columbia* v. *Carter*, 409 U.S. 418 (1973), holding that the District of Columbia was not a "State or Territory" for purposes of jurisdiction under § 1983. The cases dealt only with congressional intent and not with congressional power to include political subdivisions within § 1983.

[P. 1278, add to N. 6:]

See also the discussion of waiver in *Edelman* v. *Jordan*, 415 U.S. 651, 671–674 (1974).

[P. 1278, add to N. 9:]

Resolution of the immediate question came in *Employees of the Department of Public Health and Welfare* v. *Department of Public Health and Welfare*, 411 U.S. 279 (1973), in which the Court ruled that Congress had not attempted to authorize state employees to sue the State and therefore did not reach the issues of waiver and validity. Justices Marshall and Stewart, concurring, thought that Congress could not authorize such suits in federal courts but could validly authorize suits in state courts. Id., 287. Dissenting, Justice Brennan found that Congress had intended to authorize such suits, that the waiver doctrine was applicable to permit the authorization, and that even if such were not the case the Eleventh Amendment was no barrier to such an authorization. Id., 298. Certain dicta in the Court's opinion is contrary to this last contention, however. Id., 284, 285.

[P. 1279, add to N. 5:]

See also *Scheuer* v. *Rhodes*, 416 U.S. 233 (1974).

[P. 1279, add to N. 6:]

See also *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

[P. 1282, add new paragraph in text following N. 24:]

In *Edelman* v. *Jordan*,[1.5] the Court held that *Ex parte Young*, while authorizing suit in federal court to require state officials to comply in the future with claims payment provisions of the welfare

[1.5] 415 U.S. 651 (1974).

assistance sections of the Social Security Act, did not permit federal courts to hear suits claiming retroactive payment of funds found to be wrongfully withheld. Conceding that some the characteristics of prospective and retroactive relief would be the same in their effects upon the state treasury, the Court nonetheless believed that retroactive payments were equivalent to the imposition of liabilities which must be paid from public funds in the state treasury and which was barred by the Eleventh Amendment. The spending of money from the state treasury by state officials shaping their conduct in accordance with a prospective-only injunction is "an ancillary effect" which "is a permissible and often an inevitable consequence" of *Ex parte Young*, whereas "payment of state funds . . . as a form of compensation" to those wrongfully denied the funds in the past "is in practical effect indistinguishable in many aspects from an award of damages against the State." [2.5]

[2.5] Id., 668. Justices Douglas, Brennan, Marshall, and Blackmun dissented, arguing primarily that the State had waived its immunity by participating in the program. Id., 678, 687, 688.

[P. 1282, following N. 2 in text, add:]

Thus, in *Scheuer* v. *Rhodes*,[3.5] the Court unanimously held that plaintiffs were not barred by the Amendments from suing state officials alleging that they deprived persons of a federal right under color of state law when it is clear the plaintiffs are seeking to impose individual and personal liability on the officials. Further, the Court indicated, the officials were not protected by any concept of absolute "executive immunity." Rather, the immunity of state officials is qualified and varies according to the scope of discretion and responsibilities of the particular office and the circumstances existing at the time the challenged action was taken.

[3.5] 416 U.S. 233 (1974).

AMENDMENT 13—SLAVERY AND INVOLUNTARY SERVITUDE

[P. 1293, add to N. 24:]

The lower court decision was overturned in *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973).

AMENDMENT 14—RIGHTS GUARANTEED

Substantive Due Process

[P. 1316, add to N. 22:]

While the Court continues to assert the nonexistence of substantive due process when reviewing economic regulations, *North Dakota State Bd. of Pharmacy* v. *Snyder's Drug Stores*, 414 U.S. 156, 164–167 (1973); *Dean* v. *Gadsden Times Pub. Co.*, 412 U.S. 543 (1973), clearly the doctrine is alive in what may be denominated personal liberty situations. *Roe* v. *Wade*, 410 U.S. 113 (1973).

[P. 1325, add to N. 8:]

See also Dean v. *Gadsden Times Pub. Co.*, 412 U.S. 543 (1973) (sustaining statute providing that employee excused for jury duty should be entitled to full compensation from employer, less the jury service fee).

[P. 1362, in text following N. 12, add:]

This case was overruled, however, when the Court sustained a law establishing as a qualification for obtaining or retaining a pharmacy operating permit that one either be a registered pharmacist in good standing or that the corporation or association have a majority of its stock owned by registered pharmacists in good standing who are actively and regularly employed in and responsible for the management, supervision, and operation of such pharmacy.[1.5]

[1.5] *North Dakota State Bd. of Pharmacy* v. *Snyder's Drug Stores*, 414 U.S. 156 (1973).

[P. 1368, add to text following N. 12:]

A village land use ordinance restricting housing in the community to one-family dwellings, in which any number of persons related by blood, adoption, or marriage could occupy a house but only two unrelated persons could do so was sustained as valid exercise of the police power in the public interest, absent a showing that it was aimed at the deprivation of a "fundamental interest." [2.5]

[2.5] *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974). The ordinance had been attacked primarily on equal protection grounds. The public interest standard was broadly defined. "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people." Id., 9.

[P. 1406, in text following N. 16, add:]

Abortion.—Laws limiting or prohibiting abortions in practically all the States, the District of Columbia, and the territories were invalidated by a ruling recognizing a right of personal privacy protected by the due process clause that included a qualified right of a woman to determine whether to bear a child or not.[3.5] On the basis of its analysis of the competing individual right and state interests, the Court discerned a three-stage balancing of right and interests extending over the full nine-month term of pregnancy.

"(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

"(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

"(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." [4.5]

A lengthy history of the medical and legal views of abortion apparently convinced the Court that the prohibition of abortion lacked the solid foundation necessary to preserve such prohibitions from constitutional review now.[5.5] Similarly, a review of the concept of "person" as protected in the due process clause and in other provisions of the Constitution established to the Court's satisfaction that the word "person" did not include the unborn and therefore that the unborn lacked federal constitutional protection.[6.5] Without treating the question in more than summary fashion, the Court announced that "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist in the Constitution" and that it is "founded in the Four-

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[3.5] *Roe* v. *Wade*, 410 U.S. 113 (1973). A companion case was *Doe* v. *Bolton*, 410 U.S. 179 (1973). The opinion by Justice Blackmun was concurred in by Justices Douglas, Brennan, Stewart, Marshall, and Powell, and Chief Justice Burger. Justices White and Rehnquist dissented, id., 171, 221, arguing that the Court should follow the traditional due process test of determining whether a law has a rational relation to a valid state objective and that so judged the statute was valid. Justice Rehnquist was willing to consider an absolute ban on abortions even when the mother's life is in jeopardy to be a denial of due process, id., 173, while Justice White left the issue open. Id., 223.

[4.5] *Roe* v. *Wade*, 410 U.S. 113, 164–165 (1973).

[5.5] Id., 129–147.

[6.5] Id., 156–159.

teenth Amendment's concept of personal liberty and restrictions upon state action." [7.5] "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." [8.5] Moreover, this right of privacy is "fundamental" and, drawing upon the strict standard of review in equal protection litigation, the Court held that the due process clause required that regulations limiting this fundamental right may be justified only by a "compelling state interest" and must be narrowly drawn to express only the legitimate state interests at stake.[9.5] Assessing the possible interests of the States, the Court rejected as unsupported in the record and ill-served by the laws in question justifications relating to the promotion of morality and the protection of women from the medical hazards of abortions. The state interest in protecting the life of the fetus was held to be limited by the lack of a social consensus with regard to the issue when life begins. Two valid state interests were recognized, however. "[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . [and] it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.' " [10.5]

This approach led to the three-stage concept quoted above. Because medical data indicated that abortion prior to the end of the first trimester is relatively safe, the mortality rate being lower than the rates for normal childbirth, and because the fetus has no capability of meaningful life outside the mother's womb, the State has no "compelling interest" in the first trimester and "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." [11.5] In the intermediate trimester, the danger to the woman increases and the State may therefore regulate the abortion procedure "to the extent that the regulation reasonably relates to the preservation and protection of maternal health", but the fetus is still not able to survive outside the womb so that the actual decision to have an abortion cannot be otherwise impeded.[12.5] "With respect to the State's important and legitimate interest in potential life, the 'com-

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[7.5] Id., 152, 153.

[8.5] Ibid.

[9.5] Id., 152, 155–156. The "compelling state interest" test in equal protection cases is reviewed in *text, pp. 1474–1477.*

[10.5] 410 U.S. 147–152, 159–163.

[11.5] Id., 163.

[12.5] Ibid.

pelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." [13.5]

In a companion case, the Court struck down three procedural provisions of a permissive state abortion statute.[14.5] These required that the abortion be performed in a hospital accredited by a private accrediting organization, that the operation be approved by the hospital staff abortion committee, and that the performing physician's judgment be confirmed by the independent examination of the patient by two other licensed physicians. These provisions were held not to be justified by the State's interest in maternal health because they were not reasonably related to that interest.[15.5] And a residency provision was struck down as violating the privileges and immunities clause.[16.5] But a clause making the performance of an abortion a crime except when it is based upon the doctor's "best clinical judgment that an abortion is necessary" was upheld against vagueness attack and was further held to benefit women seeking abortions inasmuch as the doctor could utilize his best clinical judgment in light of all the attendant circumstances.[17.5]

Despite the breadth of the Court's holding, questions do remain open with regard to the dimensions of the right to an abortion. Expressly left open was the issue of "the father's rights, if any exist in the constitutional context, in the abortion decision", that is, whether a State may condition access to an abortion upon the father's consent

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[13.5] Id., 163–164. A fetus becomes "viable" when it is "potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." Id., 160 (footnotes omitted).

[14.5] *Doe* v. *Bolton*, 410 U.S. 179 (1973).

[15.5] Id., 192–200.

[16.5] Id., 200. The clause is Article IV, § 2. See *text, pp. 830–838.*

[17.5] 410 U.S. 191–192. "[T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." Id., 192. Presumably this discussion applies to the Court's ruling in *Roe* holding that even in the third trimester the woman may not be forbidden to have an abortion if it is necessary to preserve her health as well as her life, 410 U.S., 163–164, a holding which is unelaborated in the opinion. See also, *United States* v. *Vuitch*, 402 U.S. 62 (1971).

as the primary question.[18.5] Similarly, whether a state withholding of public assistance or similar funds from use as payments for abortion constitutes an impermissible impediment to the right is open to resolution.[19.5] Other questions may be presented.[20.5]

Collaterally, however, the effect of *Roe* and *Doe* may extend far beyond the abortion area, inasmuch as the revitalization of substantive due process in the area of personal liberties, overlaid with the compelling state interest test, could call into question many governmental restraints upon the person. That potential may not be realized through a simple refusal to extend the doctrine. The concept of a constitutional right of privacy, though, seems possible of some undefinable expansion.

Privacy: Its Constitutional Dimensions.—Privacy has in a number of cases been identified as a core value of certain of the provisions of the Bill of Rights,[21.5] but it was not until *Griswold* v. *Connecticut* [22.5] that an independent right of privacy, derived from the confluence of several provisions of the Bill of Rights or discovered in the "penumbras" of these provisions, was expounded by the Court

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[18.5] *Roe* v. *Wade*, 410 U.S. 113, 165 n. 67 (1973). A spousal consent law was voided in *Coe* v. *Gerstein*, — F. Supp. — (D.C.S.D.Fla., 1973), appeal pending (C.A. 5), See also, *Doe* v. *Rampton*, 366 F. Supp. 189, 193 (D.C.D. Utah, 1973).

[19.5] A decision voiding the denial of medicaid funds to pay for "elective" abortions was before the Court at the time of these decisions but was remanded for reconsideration in the light of *Roe* and *Doe*. *Klein* v. *Nassau County Medical Center*, 347 F. Supp. 496 (D.C.E.D.N.Y., 1972), *vacated* and *remanded*, 412 U.S. 925 (1973). See also, *Doe* v. *Rampton*, 366 F. Supp. 189, 193 (D.C.D.Utah, 1973) Compare *United States Dept. of Agriculture* v. *Moreno*, 413 U.S. 528 (1973) and *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973).

[20.5] E.g., whether "conscience" clauses permitting individuals conscientiously opposed to abortion to decline to participate in them or permitting religiously-affiliated hospitals to refuse to perform abortions are permissible; see Health Programs Extension Act of 1973, P.L. 93-45, 87 Stat. 91, 42 U.S.C. § 300a-7, providing that receipt by private hospitals of federal assistance shall not be the basis of requiring them to perform abortions or sterilizations if such operations are barred because of religious beliefs or moral convictions. This provision was applied in *Watkins* v. *Mercy Medical Center*, 364 F. Supp. 799 (D.C.D.Idaho, 1973), and *Taylor* v. *St. Vincents Hospital*, 369 F. Supp. 948 (D.C.D.Mont., 1973). The question is thus complicated by the "state action" doctrine. See *text, pp. 1460–1469; Doe* v. *Bellin Memorial Hospital*, 479 F. 2d 756 (C.A. 7, 1973). Public hospitals apparently may not rely on the conscience defense to refuse abortions. *Nyberg* v. *City of Virginia*, 495 F. 2d 1342 (C.A. 8, 1974); *Hathaway* v. *Worcester City Hospital*, 475 F. 2d 701 (C.A. 1, 1973) (sterilizations). Still another issue is the validity of restraints upon advertising about abortion services. *Bigelow* v. *Commonwealth*, 213 Va. 191, 191 S. E. 2d 173 (1972), *vacated* and *remanded*, 413 U.S. 909 (1973), *adhered to*, 214 Va. 341, 200 S. E. 2d 680 (1973), *cert. granted*, 418 U.S. 909 (1974).

[21.5] E.g., Fourth Amendment. See *text, pp. 1045–1047.*

[22.5] 381 U.S. 479 (1965). *Text, pp. 1258–1259, 1405–1406.*

and actually used to strike down a governmental restraint. The abortion cases extended *Griswold* many degrees in several respects. First, the cases remove any lingering possibility that the right is a marital one that depends upon the relationship.[23.5] Second, the right of privacy was denominated a liberty which found its source and its protection in the due process clause of the Fourteenth Amendment.[24.5] Third, by designating the right as a "fundamental" right, the Court required a governmental restraint to be justified by a "compelling state interest." [25.5] Necessary to assessment of the effect of this development is a close analysis of the limits of the right thus protected as well as of its contents.

"The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner* v. *Oklahoma*, 316 U.S. 535, 541–542 (1942); contraception, *Eisenstadt* v. *Baird*, 405 U.S., at 453–454; id., at 460, 463–465 (White, J., concurring in result); family relationships, *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925), *Meyer* v. *Nebraska*, *supra*." [26.5] In the pornography cases decided later in the same Term, the Court denied the existence of any privacy right of customers to view unprotected material in commercial establishments, repeating the above descriptive language from *Roe*, and saying further: "the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital,

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[23.5] In *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), the Court had declined to extend the *Griswold* principle to the unmarried on privacy grounds, relying on an equal protection analysis instead. *Text, p. 1492.*

[24.5] *Roe* v. *Wade*, 410 U.S. 113, 153 (1973). See id., 167–171 (Justice Stewart concurring) Justice Douglas continues to deny that substantive due process is the basis of the decisions. *Doe* v. *Bolton*, 410 U.S. 179, 209, 212 n. 4 (1973) (concurring).

[25.5] *Supra, p. S82, n. 9.5.*

[26.5] *Roe* v. *Wade*, 410 U.S. 113, 152 (1973).

the hotel room, or as otherwise required to safeguard the right to intimacy involved." [27.5]

What is apparent from the Court's approach in these cases is that its concept of privacy is descriptive rather than analytical, making difficult an assessment of the potential of the doctrine. Privacy as a concept appears to encompass at least two different but related aspects. First, it relates to the right or the ability of individuals to determine how much and what information about themselves is to be revealed to others. Second, it relates to the idea of autonomy, the freedom of individuals to perform or not perform certain acts or subject themselves to certain experiences.[28.5] Governmental commands to do or not to do something may well implicate one or the other or both of these aspects and judicial decision about the validity of such governmental commands must necessarily be informed by use of an analytical framework balancing the governmental interests against the individual interests in maintaining freedom in one or both of the aspects of privacy. That framework cannot now be constructed on the basis of the Court's decided cases.

Griswold v. *Connecticut*,[29.5] voiding a state statute proscribing the *use* of contraceptives, seems primarily to be based upon a judicial concept of privacy flowing from the first aspect of privacy described above. That is, the predominant concern flowing through the several opinions is the threat of forced disclosure about the private and intimate lives of persons through the pervasive surveillance and investigative efforts that would be needed to enforce such a law; moreover, the concern was not limited to the outward pressures upon the confines of such provisions as the Fourth Amendment's search and seizure clauses but extended to techniques that would have been within the range of permissible investigation. Subsequent cases, however, have returned to Fourth and Fifth Amendment principles to govern official invasions of privacy.[30.5]

[27.5] *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49, 66 n. 13 (1973).

[28.5] Beardsley, "Privacy: Autonomy and Selective Disclosure." J. Pennock & J. Chapman (eds) *Privacy* (Nomos XIII) (New York: 1971), 56; A. Westin, *Privacy and Freedom* (New York: 1967), 23–63; Note, 26 Stan. L. Rev. 1161 (1974).

[29.5] 381 U.S. 479 (1965).

[30.5] E.g., *California Bankers Assn.* v. *Schultz*, 416 U.S. 21 (1974), in which the Court declined to assess the possible constitutional implications of extremely broad delegations of authority to inquire into financial transactions of persons and institutions because the implementing regulations greatly curtailed the reach of the Act; the Court's constitutional discussion, however, was set out in terms of specific First, Fourth, and Fifth Amendment violations. Concurring, however, Justices Powell and Blackmun observed that full implementation of the Act would constitute "governmental intrusion" that would "implicate legitimate

In any event, not the method of enforcement but the fact of enforcement was the issue in *Roe* and *Doe*. That is, the power of the State to deny women access to abortions, the power to proscribe the effectuation of the will and desire of women to terminate pregnancy, was at issue. Because the Court determined that the will and desire constituted a protected "liberty", the State was required to justify its proscription by a compelling interest. Once the question of the personhood of the fetus was resolved, the Court confronted in effect only two asserted interests. The health of the mother was recognized as a valid interest, thus, as we shall see, departing from a *laissez faire* "free will" approach to individual autonomy. A state interest in morality was mentioned by the Court, not because the State had raised it, but simply to defer deciding it; however, the morality issue raised concerned not the morality of abortion but the promotion of sexual morality through making abortion unavailable.[31.5]

Stanley v. *Georgia*,[32.5] holding that government may not make private possession of obscene materials for private use a crime, approaches a judicial recognition of the autonomy aspect of privacy. True it is that the possession there was in Stanley's home, a fact heavily relied on by the Court, but the police had lawfully invaded his privacy upon the authority of a valid warrant and a subsidiary Fourth Amendment issue that was available for decision was passed over in favor of a broader resolution. Inasmuch as the materials were obscene,

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expectations of privacy." Id., 78. This comment appears to be a discrete reference apart from specific constitutional provisions, inasmuch as it is followed by a separate reference to possible Fourth Amendment violations. See also *Laird* v. *Tatum*, 408 U.S. 1 (1972); *United States* v. *United States District Court*, 407 U.S. 297 (1972); *United States* v. *Dionisio*, 410 U.S. 1 (1973).

A more fruitful source of privacy learning with respect to the right of individuals to control the dissemination of information about themselves occurs when government affirmatively provides recourse to persons whose privacy has been invaded. In *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), the Court held that the First Amendment restricted recovery under a state privacy statute in which the gravamen of the complaint was reporting of misinformation to instances of actual malice in reporting, the rule governing defamation actions by public officials and public figures. *Text, pp. 1002–1007. Quaere* whether after *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), this standard holds. This question and the standard for judging invasions of privacy through truthful reporting may be dealt with in *Cox Broadcasting Corp.* v. *Cohn*, 231 Ga. 60, 200 S. E. 2d 127 (1973), *juris. postponed*, 415 U.S. 912 (1974). The availability of injunctive relief (prior restraints) is at issue in *Roe* v. *Doe*, *cert. granted*, 417 U.S. 907 (1974).

[31.5] *Roe* v. *Wade*, 410 U.S. 113, 148 (1972). Additionally, if the purpose of the statute was to deter illicit sexual conduct, the law was overbroad since it included both unmarried and married women. This morality rationale also fell afoul of overinclusion and underinclusion in *Eisenstadt* v. *Baird*, 405 U.S. 438, 447–450 (1972).

[32.5] 394 U.S. 557 (1969).

they were outside the scope of First Amendment protection. But the Court premised its decision upon one's protected right to receive what information and ideas he wished and upon one's protected "right to be free, except in a very limited circumstances, from unwanted governmental intrusions into one's privacy." [33.5] These rights were held superior to the interests Georgia asserted to override them. That is, first, the State was held to have no authority to protect an individual's mind from the effects of obscenity, to promote the moral content of one's thoughts. Second, the State's assertion that exposure to obscenity may lead to deviant sexual behavior was rejected on the basis of a lack of empirical support and, more important, on the basis that less intrusive deterrents were available. Thus, a right to be free of governmental regulation in this area was clearly recognized.

Stanley was quickly restricted to its facts, to possession of pornography in the home.[34.5] But in its important reconsideration of and reaffirmation of governmental interests in the control of pornography, the Court went beyond this restriction and recognized governmental interests that included the promotion of public morality, protection of the individual's physiological and psychological health, and improving the quality of life. "It is argued that individual 'free will' must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice. Most exercises of individual free choice—those in politics, religion, and expression of ideas—are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not allowed in our or any other society. . . . [Many laws are enacted] to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition." Furthermore, continued the Court: "Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults is always beyond state regulation is a step we are unable to take. . . . The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as 'wrong' or 'sinful.' The

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[33.5] Id., 564–565.

[34.5] *United States* v. *Reidel*, 402 U.S. 351, 354–356 (1971); *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 375–376 (1971).

States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States' 'right . . . to maintain a decent society.' " [35.5]

Evidently, then, the fundamental right of privacy that is protected by the due process clause is one functionally related to "family, marriage, motherhood, procreation, and child rearing." [36.5] Even so limited the concept may well have numerous significant aspects which will occasion major constitutional decisions. Yet, the Court does not tell us what about these particular factors of human relationships gives rise to a protected liberty and what does not and how indeed these factors vary significantly enough from other human relationships to result in differing constitutional treatment. The Court's observation "that only personal rights that can be deemed 'fundamental' . . . are included in this guarantee of personal privacy," occasioning justification by a "compelling" interest,[37.5] little elucidates the answers, inasmuch as in the same Term the Court significantly restricted its equal protection doctrine of "fundamental" interests—"compelling" interest justification by holding that the "key" to discovering whether an interest or a relationship is a "fundamental" one is whether it is "explicitly or implicitly guaranteed by the Constitution." [38.5]

Little justification exists, therefore, for a belief that an independent, discrete concept of privacy, in either of its major aspects, is emerging from developing judicial doctrines. Instead, there appears to be a tendency to designate as a right of privacy a right or interest which extensions of precedent or application of logical analysis has led the Court to conclude to protect. Because this protection is now settled to be a "liberty" which the due process clause includes, the analytical validity of denominating the particular right or interest as an element of privacy rather than as an element of "liberty" seems open to question.

[35.5] *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49, 57–63, 63–64, 68–69 (1973). And see id., 68 n. 15.

[36.5] Id., 66 n. 13.

[37.5] *Roe* v. *Wade*, 410 U.S. 113, 152 (1973).

[38.5] *San Antonio School District* v. *Rodriguz*, 411 U.S. 1, 33–34 (1973).

Procedural Due Process: Civil

[P. 1409, add to N. 8:]

But see *United States* v. *Kras*, 409 U.S. 434 (1973) (Fifth Amendment due process); *Ortwein* v. *Schwab*, 410 U.S. 656 (1973), qualifying *Boddie* in line with that in the text. See *infra*, *pp. S116–S117*.

[P. 1429, add to N. 13:]

See also *Robinson* v. *Hanrahan*, 409 U.S. 38 (1972) (notice of forfeiture proceeding mailed to convicted defendant's home address when State knew he was incarcerated was not adequate).

[P. 1432, at end of paragraph carried over from previous page, add:]

In *Arnett* v. *Kennedy*,[1.5] three Justices sought to qualify the principles laid down in *Roth* and *Sinderman* and to restore in effect some of the "right-privilege" distinction in a new formulation. Dealing with a federal law conferring upon employees the right not to be discharged except for cause, the Justices acknowledged the prior formulation that recognized that due process rights could be created through statutory grants of entitlements but they went on to observe that the same law withheld the same procedural provisions now contended for; in other words, "the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest." [2.5] Congress could qualify its conferral of an interest to qualify what the due process clause might otherwise require.

But the other six Justices, although disagreeing with each other in other respects, rejected this attempt so to formulate the issue. "This view misconceives the origin of the right to procedural due process", Justice Powell wrote. "That right is conferred not by legislative grace but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." [3.5]

In another case, the Court considerably qualified prior rulings relating to the due process rights of installment buyers who hold property on which payments are due.[4.5] The previous cases had focused upon the interests of the creditors in not being unjustly deprived of the property.[5.5] The new case required a balancing of interests. "The reality is that both seller and buyer had current, real interests in the

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[1.5] 416 U.S. 134 (1974).

[2.5] Id., 155 (Justices Rehnquist and Stewart and Chief Justice Burger).

[3.5] Id., 167 (Justices Powell and Blackmun concurring). See also id., 177 (Justice White concurring and dissenting), 203 (Justice Douglas dissenting), 206 (Justices Marshall, Douglas, and Brennan dissenting). See also *Wolff* v. *McDonnell*, 418 U.S. 539, 556–557 (1974), where the Powell formulation is stated as the rule of the Court.

[4.5] *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974).

[5.5] *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972).

property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well." [6.5]

[6.5] *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 604 (1974). See id., 623 (Justice Powell concurring), and 629 (Justices Stewart, Douglas, and Marshall dissenting).

[P. 1434, add to N. 8:]

But note the qualification of *Fuentes* in *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974).

[P. 1435, add to N. 10:]

But see *Arnett* v. *Kennedy*, 416 U.S. 134 (1974).

[P. 1435, at the end of the only full paragraph on the page, add:]

The Court in the past two Terms, drawing upon a number of prior cases, has formulated a doctrine of procedural due process requiring that when the legislature confers a benefit or imposes a detriment depending on its application upon the establishment of certain characteristics the legislature may not irrebutably presume the existence of the characteristics to disqualify someone from the benefit or to make someone subject to the detriment. Thus, while a State may require that nonresidents must pay higher tuition charges at state colleges than residents, and while the Court assumed that a durational residency requirement would be permissible as a prerequisite to a new resident qualifying for the lower tuition, it was impermissible for the State to presume conclusively that because the legal address of a student was outside the State at the time of application or outside the State at some point during the preceding year he must remain a nonresident as long as he is a student; the due process clause requires that the student be afforded an opportunity to show that he is a bona fide resident entitled to the lower tuition.[7.5] A food stamp program provision making ineligible any household that contained a member age 18 or over who was claimed as a dependent for federal income tax purposes by a person not himself eligible for stamps was voided on the ground that it created a conclusive presumption that a household containing a claimed dependent is not needy, a presumption that fairly often could

[7.5] *Vlandis* v. *Kline*, 412 U.S. 441 (1973). Joining Justice Stewart's opinion were Justices Brennan, Marshall, Blackmun, and Powell. Justice White concurred on equal protection grounds. Id., 456. Chief Justice Burger and Justices Rehnquist and Douglas dissented, arguing that the Court's opinion incorporated equal protection "strict scrutiny" into due process litigation, id., 459, and that the Court was calling up substantive due process again. Id., 463.

be shown to be false if evidence could be presented.[8.5] Mandatory maternity leave rules of defendant school boards requiring pregnant teachers to take unpaid maternity leave five and four months respectively prior to the date of the expected births of their babies were held to create a conclusive presumption that every pregnant teacher who reaches a particular point of pregnancy becomes physically incapable of continuing and were therefore voided.[9.5] The irrebutable presumption approach to certain classifications affords the Court an opportunity to choose between resort to the equal protection clause or the due process clause in judging their validity; the Court's decisions, however, do not yet permit a statement with regard to the standards utilized by the Court in deciding whether to judge a classification by equal protection analysis or by the irrebutable presumption analysis.[10.5] Moreover, despite the search in the cases for justification of the use of irrebutable presumption, it is not clear why a procedural provision which denies due process should be permissible at all.[11.5]

[8.5] *Dept. of Agriculture* v. *Murry*, 413 U.S. 508 (1973) (Fifth Amendment). Justice Douglas delivered the opinion this time and was joined by Justices Brennan, Stewart, White, and Marshall. Justice Blackmun dissented because he would have interpreted the statute to avoid the constitutional problem. Id., 520. Justices Rehnquist and Powell and Chief Justice Burger dissented, rejecting the irrebutable presumption analysis. Id., 522.

[9.5] *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974). Joining Justice Stewart's opinion were Justices Brennan, White, Marshall, and Blackmun. Justice Douglas concurred in the result only; Justice Powell rejected the irrebutable presumption doctrine but concurred on equal protection grounds. Id., 651. Justice Rehnquist and Chief Justice Burger dissented. Id., 657.

[10.5] Thus, on the same day *Murry* was decided, *Dept. of Agriculture* v. *Moreno*, 413 U.S. 528 (1973) (Fifth Amendment), held unconstitutional a companion provision of the food stamp law disqualifying any household containing an individual who is unrelated to any other household member. It would appear that each could have been decided under the doctrinal analysis of the other.

[11.5] Thus, administrative convenience was offered as justification in each of the cases and rejected, as it has been in a number of recent equal protection cases, such as those involving sex classifications, *infra, pp. S107–S108*, but the result when a more weighty justification is offered, cf. *Kahn* v. *Shevin*, 416 U.S. 351 (1974), *infra, p. S107*, cannot be predicted.

[P. 1436, add to N. 19:]

And see *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

[P. 1437, add to N. 2:]

See also *Robinson* v. *Hanrahan*, 409 U.S. 38 (1972).

[P. 1438, following N. 9 in text, add:]

However, more recent cases indicate that a hearing prior to deprivation is not invariably the due process requirement, at least in the debtor-creditor situation in which both parties have interests in the property [12.5] and in other situations as well.[13.5] Thus, *Fuentes* v. *Shevin* [14.5] was significantly qualified although it was maintained as a precedent in certain situations. The buyer is not entitled to continued use and possession of disputed goods until all issues in the case are judicially resolved after full adversary proceedings; because continued use by the debtor would diminish the value of the creditor's interest, the latter is entitled to take possession until the matter is resolved and because notice prior to seizure could permit the debtor to conceal, destroy, or further encumber the goods, the former is not entitled to notice and hearing prior to seizure, always provided that certain amenities are observed. *Fuentes* and *Mitchell* are distinguishable in several respects and it is apparently these differences which a procedure must have in order to comport with due process standards. That is, the law must require, as a precondition to invoking state aid to sequester or otherwise seize property of an alleged defaulting debtor, (1) that the creditor furnish adequate security to protect the debtor's interest, (2) that the creditor make a specific factual showing before a neutral officer or magistrate, and not a clerk or other such functionary, of probable cause to believe that he is entitled to the relief requested, and (3) that an opportunity for an adversary hearing must be assured promptly after sequestration or other seizure to determine the merits of the controversy, with the burden of proof on the creditor.[15.5] It may be also that summary action must be so structured as to minimize the possibilities of a mistaken deprivation, as, for example, in the nature of the claim of entitlement.[16.5]

[12.5] *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974).

[13.5] *Arnett* v. *Kennedy*, 416 U.S. 134 (1974).

[14.5] 407 U.S. 67 (1972). The decision was four-to-three, Justices Powell and Rehnquist having joined the Court after argument in that case.

[15.5] *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 615–618 (1974). See esp. id., 623 (Justice Powell concurring). Justices Stewart, Douglas, Marshall, and Brennan dissented. Id., 629, 636.

[16.5] Id., 617–618. And see *Arnett* v. *Kennedy*, 416 U.S. 134, 188 (1974) (Justice White concurring and dissenting).

As a result of divergent lines of reasoning among the Justices, the Court has concluded that a public employee with a sufficient property interest in continued employment to require the application of procedural due process protection to the dismissal process has no constitutional right to an evidentiary hearing before he is discharged; six Justices agreed, however, that once the legislature has conferred a protected interest in the employment, as by providing for discharge for "cause," a hearing at some point must be provided.[17.5]

[17.5] *Arnett* v. *Kennedy*, 416 U.S. 134 (1974) (Fifth Amendment).

[P. 1438, add to N. 14:]

See also *Gibson* v. *Berryhill*, 411 U.S. 564 (1973); and compare *Arnett* v. *Kennedy*, 416 U.S. 134, 170 n. 5 (1974) (Justice Powell), with id., 196–199 (Justice White), and 216 (Justice Marshall).

Procedural Due Process: Criminal

[P. 1440, add to N. 4:]

Note the recurrence to due process reasoning, as distinct from reliance on more specific Bill of Rights provisions, in *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), and *Wardius* v. *Oregon*, 412 U.S. 470 (1973).

[P. 1441, add to N. 4:]

See *Smith* v. *Goguen*, 415 U.S. 566 (1974), noted *supra, p. S60.*

[P. 1444, prior to the section entitled Initiation of the Prosecution, add:]

Criminal Identification Process.—The conduct by police of identification processes seeking to identify the perpetrators of crimes—by lineups, showups, photographic displays, and the like—can raise due process problems. For postindictment lineups and showups conducted before June 12, 1967,[1.5] for preindictment lineups and showups,[2.5] and for identification processes at which the defendant is not present,[3.5] the question with regard to the admissibility of an in-court identification or of testimony with regard to an out-of-court identification is whether there is "a very substantial likelihood of misidentification" and that question must be determined "on the totality of the circumstances."[4.5]

[1.5] *Stovall* v. *Denno*, 388 U.S. 293 (1967). See *text, pp. 1224–1226.*

[2.5] *Kirby* v. *Illinois*, 406 U.S. 682 (1972).

[3.5] *United States* v. *Ash*, 413 U.S. 300 (1973) (Fifth Amendment due process).

[4.5] *Neil* v. *Biggers*, 409 U.S. 188, 196–201 (1972). "As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

"Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." [5.5] The Court declined in this case to adopt a rule barring the exclusion of an identification because it was obtained under conditions of unnecessary suggestiveness alone, but the express reason was that the showup took place prior to any of the Court's decisions calling these practices into question. Therefore, the question of the adoption of such a rule remains open.[6.5]

Id., 199. See also *Stovall* v. *Denno*, 388 U.S. 293 (1967) ; *Simmons* v. *United States*, 390 U.S. 377 (1968) ; *Foster* v. *California*, 394 U.S. 440 (1969) ; *Coleman* v. *Alabama*, 399 U.S. 1 (1970).

[5.5] *Neil* v. *Biggers*, 409 U.S. 188, 198 (1972).

[6.5] Id., 199.

[P. 1445, following N. 1 in text, add:]

It is permissible for the State to require a defendant to give pretrial notice of an intention to rely on an alibi defense and to furnish the names of supporting witnesses, but due process requires reciprocal discovery in this respect if the State so requires, necessitating that the State give defendant pretrial notice of its rebuttal evidence on the alibi issue.[1.5] Ordinary evidentiary rules of criminal trials may in some instances deny a defendant due process. Thus, the combination in a trial of two rules (1) that denied defendant the right to cross-examine his own witness, whom he had called because the prosecution would not, in order to elicit evidence exculpatory to defendant and (2) that denied defendant the right to introduce the testimony of witnesses about matters told them out of court on the ground the testimony would be hearsay, under all the circumstances, denied defendant his constitutional right to present his own defense in a meaningful way.[2.5] In the context of a charge to the jury in which the jury was twice explicitly instructed that defendant is presumed to be innocent and that the State must prove guilt beyond a reasonable doubt, inclusion in the charge of an instruction that every witness is presumed to speak the truth, which presumption may be overcome by contradictory evidence, neither shifted the burden of proof to defendant nor negated the presumption of innocence and due process was not denied.[3.5]

[1.5] *Wardius* v. *Oregon*, 412 U.S. 470 (1973).

[2.5] *Chambers* v. *Mississippi*, 410 U.S. 284 (1973). See also *Davis* v. *Alaska*, 415 U.S. 308 (1974).

[3.5] *Cupp* v. *Naughten*, 414 U.S. 141 (1973).

[P. 1445, add to N. 2:]

Tumey was extended slightly in *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972).

[P. 1445, in N. 3 following citation to Johnson v. Mississippi, add:]

Taylor v. *Hayes*, 418 U.S. 488 (1974).

[P. 1446, add to N. 9:]

A guilty plea will waive challenges to alleged unconstitutional acts occurring prior to the plea, unless the convicted defendant can show that his plea on the advice of counsel resulted from advice which it was incompetent for the attorney to give. *Tollett* v. *Henderson*, 411 U.S. 258 (1973); *Davis* v. *United States*, 411 U.S. 233 (1973).

[P. 1448, add to N. 17:]

But see *Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974).

[P. 1451, add to N. 4:]

Peace was held to be nonretroactive in *Michigan* v. *Payne*, 412 U.S. 47 (1973).

[P. 1451, following N. 4 in text, add:]

Because the possibility of vindictiveness in resentencing is *de minimis* when it is the jury which sentences, *Pearce's* requirement that a judge resentencing on a subsequent trial must justify a more severe sentence is inapplicable to jury sentencing, at least in the absence of a showing that the jury knew of the prior vacated sentence. The Court concluded the possibility of vindictiveness was so low because normally the jury would not know of the result of the prior trial nor the sentence imposed, nor would it feel either the personal or institutional interests of judges leading to efforts to discourage the seeking of new trials.[1.5] However, the *Pearce* rationale was applied to preclude a prosecutor from charging with a higher offense a defendant convicted of a lesser charged offense in an inferior court when the defendant sought and obtained a trial *de novo* in a higher court. The possibility that a prosecutor might charge an offender with a more serious offense in order to penalize an exercise of the right of appeal or to deter the exercise of the right presented "a realistic likelihood of 'vindictiveness.'" [2.5]

[1.5] *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973). Justices Stewart, Brennan, and Marshall thought the principle was applicable to jury sentencing and that prophylactic limitations appropriate to the problem should be developed. Id., 35, 38. Justice Douglas dissented on other grounds. Id., 35.

[2.5] *Blackledge* v. *Perry*, 417 U.S. 21 (1974). Justice Rehnquist dissented. Id., 32.

[P. 1452, add to N. 13:]

Ross v. *Moffit*, 417 U.S. 600 (1974), makes the same point.

[P. 1455, add to N. 4:]

See also *Wolff* v. *McDonnell*, 418 U.S. 539, 577–580 (1974).

[P. 1455, following first full paragraph on page, add:]

In *Wolff* v. *McDonnell*,[1.5] the Court promulgated due process standards to govern the imposition of discipline upon prisoners. "Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, ... But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime." [2.5] Due process applies, but since prison disciplinary proceedings are not part of a criminal prosecution the full panoply of rights of a defendant are not available. Rather, the analysis must proceed on a basis of identifying the interest in "liberty" which the clause protects.

Where the state provides for good-time credit or other privileges and further provides for forfeiture of these privileges only for serious misconduct, the interest of the prisoner in this degree of "liberty" entitles him to those minimum procedures appropriate under the circumstances.[3.5] What the minimum procedures consist of is to be determined by balancing the prisoner's interest against the valid interest of the prison in maintaining security and order in the institution, in protecting guards and prisoners against retaliation by other prisoners, and in reducing prison tensions. Therefore, the prison must afford the subject of a disciplinary proceeding advance written notice of the claimed violation and a written statement of the factfindings as to the evidence relied upon and the reasons for the action taken; the inmate should be allowed to call witnesses and present documentary evidence in defense when permitting him to do so will not hazard the institution's interests. Confrontation and cross-examination of adverse witnesses is not required inasmuch as these would no doubt hazard valid institutional interests. Ordinarily, an inmate has no right to representation by retained or appointed counsel. Limitations imposed on the discretion of the body conducting the proceedings met the impartial tribunal requirement.[4.5]

[1.5] 418 U.S. 539 (1974).

[2.5] Id., 555.

[3.5] Id., 557. This analysis, of course, tracks the property interest analysis discussed *supra, p. S90.*

[4.5] 418 U.S. 539, 561–572. Justices Marshall, Douglas, and Brennan argued that inmates should receive a higher procedural protection. Id., 580.

[P. 1457, following N. 16 in text, add:]

The Court has now applied a flexible due process standard in regard to the provision of counsel. Counsel is not invariably required in parole or probation revocation proceedings. The State should, how-

ever, provide the assistance of counsel where an indigent person may have difficulty in presenting his version of disputed facts without cross-examination of witnesses or presentation of complicated documentary evidence. Presumptively, counsel should be provided where the person requests counsel, based on a timely and colorable claim that he has not committed the alleged violation, or if that issue be uncontested, there are reasons in justification or mitigation that might make revocation inappropriate.[5.5]

[5.5] *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973).

Equal Protection of the Laws
[P. 1461, following N. 5 in text, add:]

Confronting in a case arising from Denver, Colorado, the issue of a school system in which no statutory dual system had ever been imposed, the Court restated the obvious principle that racial segregation caused by "intentionally segregative school board actions" is *de jure*, and not *de facto*, just as if it had been mandated by statute. "[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is purpose or intent to segregate." Where it is proved that a meaningful portion of a school system is segregated as a result of official action, the official agency must bear the burden of proving that other school segregation within the system is adventitious and not the result of official action. It is not the responsibility of complainants to show that each school in a system is *de jure* segregated to be entitled to a system-wide desegregation plan.[1.5]

Different results follow, however, when inter-district segregation is in issue. Disregard of district lines is permissible by a federal court in formulating a desegregation plan only when it finds an inter-district violation. "Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the

[1.5] *Keyes* v. *Denver School District*, 413 U.S. 189, 198, 208–209 (1973). Justice Douglas would abolish the *de jure-de facto* distinction by defining all racial separation as the result of state action. Id., 214. Justice Powell would similarly abandon the distinction by "hold[ing], quite simply, that where segregated public schools exist within a school district to a substantial degree, there is a *prima facie* case that the duly constituted public authorities . . . are sufficiently responsible to warrant imposing upon them a nationally applicable burden to demonstrate they nevertheless are operating a genuinely integrated school system." Id., 217, 224. Both Justices thus would formally bring their principle within the "state action" concept.

state or local school districts, or of a single school district, have been a substantial cause of inter-district segregation." [2.5] The *de jure-de facto* distinction is thus well established in school cases and is firmly grounded upon the "state action" language of the Fourteenth Amendment. Of course, important issues remain in delineating the responsibility of the State itself or of non-school official agencies for conditions, such as zoning and court enforcement of racially restrictive covenants that lead to residential segregation, which contribute substantially to separation by race in the schools. But the basic analysis remains anchored to the "state action" doctrine.

[2.5] *Milliken* v. *Bradley*, 418 U.S. 717 (1974). The four dissenters, Justices Marshall, White, Douglas, and Brennan, would have found the "state action" requirement satisfied by holding that the segregative actions of the State itself and of its agent, the Detroit school board, imposed upon the State the obligation to adopt a plan to eliminate the officially-sanctioned segregation within Detroit in the most effective and expeditious way, the only way being an inter-district plan. Id., 781, 783.

[P. 1467, following N. 10 in text, add:]

An inconclusive debate among the Justices with regard to whether the broadcast media is impressed with state action, because of governmental licensing and regulation and the allocation of the broadcast spectrum to stations, revealed substantial division among them but no clear answer as to what point licensing and regulation impress upon private parties enough indicia of governmental action to implicate the Constitution.[3.5]

[3.5] *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94 (1973). Two Justices clearly thought that a broadcast licensee was neither a "partner" of government nor was it engaged in any "symbiotic relationship" with government. Id., 114–121. (Chief Justice Burger and Justice Rehnquist). Justices Douglas and Stewart at least formally agreed there was no "state action" but their views seemed impelled by the conclusion they would have been forced to by reaching the opposite view. Id., 132, 148. Justices Brennan and Marshall found the requisite governmental action. Id., 170, 172–181. A clearer answer may be forthcoming in *Jackson* v. *Metropolitan Edison Co.*, 483 F. 2d 754 (C.A. 3, 1973), *cert. granted*, 415 U.S. 913 (1974) (whether action of electrical utility subject to very close state regulation is so impressed with state action as to require observance of certain consitutional provisions). Cf. *Lucas* v. *Wisconsin Electric Power Co.*, 466 F. 2d 638 (C.A. 7, 1972), *cert. den.*, 409 U.S. 1114 (1973).

[P. 1477, following final paragraph of section add:]

The Court continues to adhere to its "two-tier" approach to equal protection analysis, under which classifications involving a "fundamental interest" or "suspect classification" are subject to "strict scrutiny" while all other classifications are tested by a standard of mini-

mum rationality. It was suggested by at least one commentator [1.5] that the Court was moving to adoption of an intermediate standard, at least in some cases, in which, in the absence of the factors leading to strict scrutiny, the Court would go beyond the minimum rationality standard to one of "intensified means" scrutiny under which the Justices would examine the means used to effectuate a legislative end and determine whether the statute bears a rational relationship to that end. However, in the major case of this period, Justice Powell for the Court analyzed the issues solely in terms of the two-tier approach, determining that because the interests involved did not occasion strict scrutiny the Court would thus decide the case on minimum rationality standards.[2.5] Dissenting, Justice Marshall objected to this "rigidified approach" and argued that the Court's precedents in fact "reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." [3.5] While the Court continues to deal formally in terms of the two-tier approach, however, it seems clear that some opinions which purport to be based upon the minimum rationality standard do not actually seem to fit within that framework, suggesting at the least that in some cases the traditional standard will not be satisfied by the type of showing that would be sufficient in still other cases.[4.5]

[1.5] Gunther, "Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 Harv. L. Rev. 1 (1972).

[2.5] *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 29–40 (1973).

[3.5] Id., 98–99 (dissenting). This approach Justice Marshall had previously advocated in *Dandridge* v. *Williams*, 397 U.S. 471, 520–521 (1970) (dissenting). See also *Marshall* v. *United States*, 414 U.S. 417, 430, 432 (1974). Justice White in *Vlandis* v. *Kline*, 412 U.S. 441, 456, 458–459 (1973), accepted Justice Marshall's analysis as accurately reflecting the Court's practice. Chief Justice Burger and Justice Rehnquist disagree. Id., 459, 460–461; and see *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 30–34 (1973) (Justice Powell for the Court).

[4.5] E.g., *Dept. of Agriculture* v. *Moreno*, 413 U.S. 528 (1973) (Fifth Amendment). See particularly Justice Powell's opinions in *Frontiero* v. *Richardson*, 411 U.S. 677, 691 (1973) (concurring), and *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 651 (1974) (concurring). Compare the style of analysis in *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973), and *City of Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369 (1974), with that in *Kahn* v. *Shevin*, 416 U.S. 351 (1974), and *Geduldig* v. *Aiello*, 417 U.S. 484 (1974).

This period saw also an increased reluctance on the part of the Court in applying strict scrutiny to always void a classification [5.5] and, more important, a declination to extend the categories of "fundamental interests" and "suspect classifications" which would trigger strict scrutiny.[6.5] In some respects, the development of the irreputable presumption doctrine permitted the Court an alternative to utilization of strict scrutiny,[7.5] but in other respects it seems clear the "new equal protection" has been circumscribed considerably.

[5.5] E.g., *Marston* v. *Lewis*, 410 U.S. 679 (1973); *Storer* v. *Brown*, 415 U.S. 724 (1974); *American Party of Texas* v. *White*, 415 U.S. 767 (1974). And see *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), and *Mahan* v. *Howell*, 410 U.S. 315 (1973).

[6.5] *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973), is the major formulation of limiting doctrine, holding that those interests are "fundamental" only if they are explicitly or implicitly guaranteed by the Constitution, id., 33–34, and that a *de jure* or *de facto* wealth classification standing alone is not "suspect." Id., 28–29.

[7.5] *Supra, p. S91.*

[P. 1477, add to N. 41:]

See *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Kahn* v. *Shevin*, 416 U.S. 351 (1974). And see *City of Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369 (1974).

[P. 1480, add to N. 15:]

This case was formally overruled in *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973).

[P. 1492, add to N. 4:]

See also *Dept. of Agriculture* v. *Moreno*, 413 U.S. 528 (1973); *Johnson* v. *Robison*, 415 U.S. 361 (1974) (both under Fifth Amendment).

[P. 1493, in text following N. 13, add:]

A statute denying state prisoners good time credit for presentence incarceration but permitting those prisoners who obtain bail or other release immediately to receive good time credit for the entire period which they ultimately spend in custody, good time counting toward the date of eligibility for parole, does not deny the prisoners incarcerated in local jails equal protection inasmuch as the distinction is rationally justified by the fact that good time credit is designed to encourage prisoners to engage in rehabilitation courses and activities which exist only in state prisons and not in local jails.[1.5]

[1.5] *McGinnis* v. *Royster*, 410 U.S. 263 (1973). Cf. *Hurtado* v. *United States*, 410 U.S. 578 (1973) (Fifth Amendment).

[P. 1493, add to N. 15:]

But see *Fuller* v. *Oregon*, 417 U.S. 40 (1974) (imposition of reimbursement obligation for state-provided defense assistance upon convicted defendants but not upon those not convicted or whose convictions are reversed is objectively rational).

Equal Protection and Race

[P. 1500, add to N. 17:]

In connection with state circumvention of desegregation orders, two recent cases set down the limiting principle. Striking down state provision of textbooks on loan to students attending private, segregated schools, the Court observed that "the constitutional infirmity of the Mississippi textbook program is that it significantly aids the organization and continuation of a separate system of private schools which . . . may discriminate if they so desire. A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination." The Court distinguished between such aid as textbooks and tuition grants, which inure to the benefit of the private schools and which are provided only in the context of schools, and generalized services government might provide to schools in common with others, such as electricity, water, and police and fire protection. *Norwood* v. *Harrison*, 413 U.S. 455, 463–464, 465, 467 (1973).

In *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974), the Court approved the enjoining of the city from permitting exclusive access to its recreational facilities by segregated private schools and by groups affiliated with such schools. The City's action was found to undercut both school desegregation orders and orders to desegregate public recreational facilities. The Court remanded another part of the injunction, however, for the district court to determine whether the use of zoos, museums, parks and other recreational facilities by private school groups in common with others, and by private nonschool organizations, involves government so directly in the actions of those users as to warrant court intervention on constitutional grounds.

[P. 1501, following N. 22 in text, add:]

Northern schools: Inter- and Intradistrict Desegregation.— Accepting the findings of lower courts that the actions of public school officials in Detroit and of the state school board were responsible in part for the racial segregation existing within the school system of the City of Detroit, the Court set aside a desegregation order which required the formulation of a plan for a metropolitan area including the City and 53 adjacent suburban school districts.[1.5] As was noted above,[2.5] the basic holding of the Court was that such a remedy could be implemented only to remedy an inter-district constitutional violation, a finding that the actions of state officials and of the suburban

[1.5] *Milliken* v. *Bradley*, 418 U.S. 717 (1974).

[2.5] *Supra*, *p. S98.*

school districts were responsible, at least in part, for the inter-district segregation, that Negroes had been fenced out of the suburbs and kept within the City. "[A]n inter-district remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race." [3.5] The permissible scope of an inter-district order, however, would have to be considered in light of the Court's language regarding the value placed upon local educational units. "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." [4.5] Too, the complexity of formulating and overseeing the implementation of a plan that would effect a *de facto* consolidation of multiple school districts, the Court indicated, would impose a task which few, if any, judges are qualified to perform and one which would deprive the people of control of their schools through elected representatives.[5.5] "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district." [6.5]

Determination of the existence of a constitutional violation within one district and the formulation of remedies are the subjects of the court's decision in *Keyes* v. *Denver School District*,[7.5] in which the lower courts had found the school segregation existing within one part of the City to be attributable to official action but in which the lower courts had also treated as a separate question the legal status of segregation in the rest of the City's schools. The Court found this to be error, holding that when it is found that one portion of a system is officially segregated there devolves upon the school system itself the burden of showing that segregation in other portions of the system is not also officially contrived. A finding that one portion of a school system is officially segregated may well be the predicate for finding that

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[3.5] *Milliken* v. *Bradley*, 418 U.S. 717, 745 (1974).

[4.5] Id., 741–742.

[5.5] Id., 742–743. This theme has been sounded in a number of cases in suits seeking remedial actions in particularly intractible areas. *Mayor* v. *Educational Equality League*, 415 U.S. 605, 615 (1974); *O'Shea* v. *Littleton*, 414 U.S. 488, 500–502 (1974).

[6.5] *Milliken* v. *Bradley*, 418 U.S. 717, 746 (1974). The four dissenters, as has been noted, argued both that state involvement was so pervasive that an inter-district order was permissible and that such an order was mandated because it was the State's obligation to establish a unitary system, an obligation which could not be met without an inter-district order. Id., 757, 762, 781.

[7.5] 413 U.S. 189 (1973).

the entire system is a dual one, necessitating the imposition upon the school authorities of the affirmative obligation to create a unitary system throughout.[8.5]

With regard to the achievement of a unitary system in any district, the Court's opinion in *Swann*[9.5] remains the focal point of guidance. The greatest amount of controversy, of course, centers upon the transportation of students beyond the schools nearest their homes in order to achieve desegregation. Busing has occasioned considerable debate in Congress, both over legislative revision to curb it [10.5] and over constitutional amendments to render it beyond the power of courts,[11.5] a great degree of attention in the Executive Branch, which has proposed to Congress recommendations for legislation,[12.5] and a mass of litigation in the courts.[13.5] *Swann*, of course, sanctioned an order requiring fairly extensive amounts of busing, but it cautioned as well that there were limits occasioned by the nature of the educational process and the well-being of children that courts must observe.[14.5] Qualifications have been pressed within the Court,[15.5] and while no

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[8.5] Id., 207–211. Justice Rehnquist, in dissent, argued that imposition of a district-wide desegregation order should not proceed from a finding of segregative intent and effect in only one portion, that in effect the Court was imposing an affirmative obligation to integrate without first finding a constitutional violation. Id., 254.

[9.5] *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

[10.5] See e.g., § 407(a) of the Civil Rights Act of 1964, 78 Stat. 248, 42 U.S.C. § 2000c–6, interpreted in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 17–18 (1971); § 803 of the Education Amendments of 1972, 86 Stat. 372, 20 U.S.C. § 1653 (expired), interpreted in *Drummond* v. *Acree*, 409 U.S. 1228 (1972) (Justice Powell as Circuit Justice); Title II, Elementary and Secondary Education Act Amendments of 1974, P.L. 93–380. See *Busing of Schoolchildren*, Hearings before the Senate Judiciary Subcommittee on Constitutional Rights, 93d Congress 2d sess. (1974).

[11.5] *Anti-Busing Amendments*, Hearings before the Senate Judiciary Committee, 93d Congress, 2d sess. (1974).

[12.5] Educational Opportunity and Busing, National Speech and Message to Congress, 8 *Weekly Compilation of Presidential Documents* 590 (1972); see also 10 id. 537 (1974).

[13.5] One principal issue being whether any one-race or practically one-race schools may be permissible or whether they must be altogether done away with, through busing or otherwise. Inconsistent answers have been given in the courts of appeal. E.g., *Goss* v. *Knoxville Board of Education*, 482 F. 2d 1044 (C.A. 6, 1973), *cert. den.*, 414 U.S. 1171 (1974); *Medley* v. *Danville School Board*, 482 F. 2d 1061 (C.A. 4, 1973), *cert. den.*, 414 U.S. 1172 (1974). See *Milliken* v. *Bradley*, 418 U.S. 717, 747 n. 22 (1974).

[14.5] *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 30–31 (1971).

[15.5] See Justice Powell in *Keyes* v. *Denver School District*, 413 U.S. 189, 217 (1973) (concurring and dissenting).

sign has appeared that the Court has withdrawn from the *Swann* standards the appearance in the Court of cases from large metropolitan areas, North and South, should call forth new consideration of the scope of desegregation orders in that context.

[P. 1502, add to N. 3:]

On *voir dire* examination of potential jurors, the judge, where *voir dire* examination is conducted by the judge, is required upon request to interrogate the jurors upon the subject of racial prejudice. *Ham* v. *South Carolina*, 409 U.S. 524 (1973).

[P. 1504, add to N. 21:]

See also *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973). Cf. *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

The New Equal Protection

[P. 1508, following N. 8 in text, add:]

Continuing to build upon its designation of alienage as a suspect classification, the Court voided state bars against the admission of aliens to the practice of law and the employment of aliens in the public service. In the former case, the State was held not to have met the "heavy burden" of showing that its denial of admission to aliens was necessary to accomplish a constitutionally permissible and substantial interest. The State's admitted interest in assuring the requisite qualifications of persons licensed to practice law could be adequately served by judging applicants on a case-by-case basis and in no sense could the fact that a lawyer is considered to be an officer of the court serve as a valid justification for a flat prohibition.[1.5] In the latter case, the Court acknowledged the substantiality of the State's interest in making available only to citizens certain high level employment in which policy-making functions inhered, but a flat ban upon much of the State's career public service, both of policy-making and non-policy-making jobs, ran afoul of the requirement that in achieving a valid interest through the use of a suspect classification the State must employ means that are precisely drawn in light of the valid purpose.[2.5]

[1.5] *In re Griffiths*, 413 U.S. 717 (1973). Chief Justice Burger and Justice Rehnquist dissented. Id., 730, and 413 U.S., 649

[2.5] *Sugarman* v. *Dougall*, 413 U.S. 634 (1973). Justice Rehnquist dissented. Id., 649. In the course of the opinion, the Court held inapplicable the doctrine of special-public-interest, the idea that a State's concern with the restriction of the resources of the State to the advancement and profit of the citizens of that State is a valid basis for discrimination against out-of-state citizens and aliens generally, but it did not invalidate the doctrine itself. Id., 643–645.

The decisions draw in question many other exclusions of aliens from access to public and private benefits and opportunities.[3.5]

[3.5] The Court reserved decision on the validity of federal citizenship qualifications for federal employment; id., 646 n. 12; at least one court has held unconstitutional civil service regulations in this respect. *Wong* v. *Hampton*, 500 F. 2d 1004 (C.A. 9), *cert. granted* 417 U.S. 944 (1974). The Court has agreed to review a decision voiding the eligibility requirement for participation in federal medical insurance that excludes all aliens except permanent residents who have resided in the United States for at least five years. *Diaz* v. *Weinberger*, 361 F. Supp. 1 (D.C.S.D. Fla. 1973), *prob. juris. noted*, 416 U.S. 980 (1974).

See also *Satoskar* v. *Indiana Real Estate Comm.*, — F. Supp. — (D.C.S.D.Ind. 1973), *aff'd per curiam*, 417 U.S. 938 (1974) (statute requiring all applicants for licenses as real estate salesmen to be United States citizens violates equal protection clause).

[P. 1509, in text following final paragraph of section, add:]

Little question now exists that illegitimacy is a suspect classification and that a governmental classification that disadvantages an illegitimate child bears a heavy burden of justification. Thus, a Texas child support law affording legitimate children a right to judicial action to obtain support from their fathers while not affording the right to illegitimate children denied the latter equal protection. "[A] State may not individiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers *there is no constitutionally sufficient justification* for denying such an essential right to a child simply because its natural father has not married its mother." [4.5] Indeed, no question would exist were it not for the language purporting to reserve this point in a later case.[5.5]

[4.5] *Gomez* v. *Perez*, 409 U.S. 535, 538 (1973) (emphasis supplied). See also *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973) (Statute limiting welfare assistance to households in which parents are ceremonially married and the children, if natural, are adopted denied illegitimate children equal protection); *Richardson* v. *Davis*, 409 U.S. 1069 (1972), *aff'g*, 342 F. Supp. 588 (D.C.D. Conn.), and *Richardson* v. *Griffin*, 409 U.S. 1069 (1972), *aff'g*, 346 F. Supp. 1226 (D.C.D. Md.) (Social Security provision entitling illegitimate children to monthly benefit payments only to extent that payments to widow and legitimate children do not exhaust benefits allowed by law denies illegitimate children equal protection).

[5.5] *Jiminez* v. *Weinberger*, 417 U.S. 628, 631–632 (1974). The case held invalid under the equal protection standards of the Fifth Amendment due process clause, *text, pp. 1162–1165*, a Social Security provision allowing an illegitimate child ineligible for benefits under other provisions to qualify only if he was born prior to the onset of the parent's disability and if he was dependent upon the parent prior to the onset of disability. The classification, thus, was between two groups of illegitimates, but it is unclear from the opinion whether the statute's in-

validity related to the lack of basis of this classification or related to the disadvantaging of some illegitimates at all.

[P. 1510, add to N. 17:]

For the Court's initial treatment of the Equal Pay Act, 77 Stat. 56, 29 U.S.C. § 206(d), in determining what industrial conditions constitute impermissible sex discrimination in compensation, see *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974).

[P. 1511, in text following N. 23, add:]

The status of sex as a classification is very much unsettled. In *Frontiero* v. *Richardson*,[6.5] four Justices, on the basis of a long history of sex discrimination and because sex, just as race or national origin, is an immutable characteristic determined solely by accident of birth which frequently bears no relation to the abilities or merits of the individuals making up the class, were prepared to hold that classifications based upon sex are inherently suspect and must therefore be subjected to strict judicial scrutiny.[7.5] But three other Justices, reaching the same result as the four, declined at this time to decide whether sex is a suspect classification or not, inasmuch as the Equal Rights Amendment, which would be dispositive of that precise issue, is now pending before the States.[8.5] Subsequently, the Court sustained, apparently on the basis of the traditional rationality standard, a state property tax exemption provision allowing widows but not widowers a $500 exemption. In justification of the classification, the State had presented extensive statistical data showing the substantial economic and employment disabilities of women in relation to men. Thus, the state provision, the Court found, was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden."[9.5] It appears that the Court is in effect if not intentionally fol-

[6.5] 411 U.S. 677 (1973). The case held invalid under Fifth Amendment due process equal protection standards, *text, pp. 1162–1165*, a congressionally mandated military policy of providing dependents' allowances to male officers without requiring a showing of actual dependency whereas female officers had to show that their husbands were in fact dependent on them for over one-half of their support.

[7.5] Id., 684–687 (Justices Brennan, Douglas, White, and Marshall).

[8.5] Id., 691 (Justices Powell and Blackmun and Chief Justice Burger). The three thought that *Reed* v. *Reed*, 404 U.S. 71 (1971), fully supported the result. Justice Stewart concurred, citing *Reed* to support his conclusion the classification was invidious discrimination while Justice Rehnquist dissented, Ibid.

[9.5] *Kahn* v. *Shevin*, 416 U.S. 351 (1974). The opinion seemingly adopts the traditional standard because a system of taxation is in issue, id., 355, although it also notes that "[g]ender has never been rejected as an impermissible classification in all instances", citing examples of classifications favorable to women, id., 356 n. 10, tying that concept as well to taxation. The opinion, by Justice Douglas, was dissented from by Justices Brennan, Marshall, and White. Id., 357.

lowing a standard intermediate of the traditional and the strict standards in which the Court requires the proponent of the classification in issue to state the basis for the classification and to adduce the evidence to show that it is a reasonable classification.[10.5]

This impression is strengthened when the two pregnancy cases of the Term are considered. Thus, in *Cleveland Board of Education* v. *LaFleur*,[11.5] a case decided upon Fourteenth Amendment due process grounds, two school systems requiring pregnant school teachers to leave work four and five months respectively before the expected childbirth were found to have acted arbitrarily and irrationally in establishing rules not supported by anything more weighty than administrative convenience. On the other hand, the exclusion of pregnancy from a state financed program of payments to persons unemployed because of disability was upheld against equal protection attack as supportable by legitimate state interests in the maintenance of a self-sustaining program with rates low enough to permit the participation of low-income workers at affordable levels.[12.5] The absence of supportable reasons in one case and their presence in the other may well be highly significant.

[10.5] Thus, administrative convenience was essentially the justification in both *Reed* and *Frontiero* and that justification as a *sole* determinant on the basis of a sterotype was held inadequate, whereas *Kahn* was justified upon a showing of a legitimate policy and a relationship of means to ends. Enlightenment may follow from consideration of additional cases. E.g., *Ballard* v *Laird*, 360 F. Supp. 643 (D.C.S.D.Calif. 1973), *prob. juris. noted*, 415 U.S. 912 (1974) (classification in military favoring women and disfavoring men); *Healy* v. *Edwards*, 363 F. Supp. 1110 (D.C.E.D.La. 1973), *prob. juris, noted*, 415 U.S. 911 (1974), and *Taylor* v. *State*, — La. —, 282 So. 2d 491 (1973), *prob. juris. noted*, 415 U.S. 911 (1974) (statute permitting jury service by women only if they affirmatively desire to serve).

[11.5] 414 U.S. 632 (1974), *supra, p. S92.* Justice Powell concurred in the result on equal protection grounds, arguing that while the school boards' interest in continuity of teaching was a legitimate and important interest justifying some classification the classifications actually adopted were both counterproductive and overinclusive. Id., 651.

[12.5] *Geduldig* v. *Aiello*, 417 U.S. 484 (1974). The Court denied that the classification was based upon "gender as such." Classification was not on gender but on the basis of pregnancy and while only women can become pregnant that fact alone was not determinative. "The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." Id., 496 n. 20. The dissenters, Justices Brennan, Douglas, and Marshall thought the classification sex-based, however. Id., 497. Compare *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971).

[P. 1513, add to the final paragraph of the page:]

A 50-day durational residency requirement was sustained in the context of the closing of the registration process at 50 days prior to elections and of the mechanics of the State's registration process. The period, the Court found, was necessary to achieve the State's legitimate goals.[1.5]

[1.5] *Marston* v. *Lewis*, 410 U.S. 679 (1973). Registration was by volunteer workers who made statistically significant errors requiring corrections by county recorders before certification. Primary elections were held in the fall, thus occupying the time of the recorders, so that a backlog of registrations has to be processed before the election. A period of 50 days rather than 30, the Court thought, was justifiable. However, the same period was upheld for another State on the authority of *Marston* in the absence of such justification, but it appeared that plaintiffs had not controverted the State's justifying evidence. *Burns* v. *Fortson*, 410 U.S. 686 (1973). Justices Brennan, Douglas, and Marshall dissented in both cases. Id., 682, 688.

[P. 1514, add to text following N. 12:]

However, the Court held that because the activities of a water storage district fell so disproportionately on landowners as a group, a limitation of the franchise in elections for the district's board of directors to landowners, whether resident or not and whether natural persons or not, excluding non-landowning residents and lessees of land, and weighing the votes granted according to assessed valuation of land, comported with equal protection standards.[2.5] Adverting to the reservation in prior local governmental unit election cases [3.5] that some functions of such units might be so specialized as to permit deviation from the usual rules, the Court then proceeded to assess the franchise restrictions according to the traditional standards of equal protection rather than by those of strict scrutiny.[4.5] Also narrowly approached was the issue of the effect of the District's activities, the Court focusing upon the assessments against landowners as the sole means of paying expenses rather than additionally noting the impact upon lessees and non-landowning residents of such functions as flood control. The approach taken in this case seems different in great degree from that in prior cases and could in the future alter the results in other local government cases.

[2.5] *Salyer Land Co.* v. *Tulare Water Storage District*, 410 U.S. 719 (1973). See also *Associated Enterprises* v. *Toltec Watershed Imp. Dist.*, 410 U.S. 743 (1973) (limitation of franchise to property owners in the creation and maintenance of district upheld). Justices Douglas, Brennan, and Marshall dissented in both cases. Id., 735, 745.

[3.5] 410 U.S. 727–728.

[4.5] Id., 730, 732. Thus, the Court posited reasons that might have moved the legislature to adopt the exclusions.

[P. 1514, in text following N. 14, add:]

Absentee balloting by unconvicted jail inmates and convicted misdemeanants under no disability remains an open constitutional issue,[5.5] but the Court has sustained the disqualification from suffrage of persons convicted of "infamous crimes" who have served their sentences or completed their terms of parole, the Court relying upon an implied recognition of the validity of such disqualification in § 2 of the Fourteenth Amendment.[6.5]

Finding that prevention of "raiding"—the practice whereby voters in sympathy with one party vote in another's primary election in order to distort that election's results—is a legitimate and valid state goal, as one element in the preservation of the integrity of the electoral process, the Court sustained a state law requiring those voters eligible at that time to register to enroll in the party of their choice at least 30 days before the general election in order to be eligible to vote in the party's next primary election, 8 to 11 months hence. The law did not impose a prohibition upon voting but merely imposed a time deadline for enrollment, the Court held, and it was because of the plaintiffs' voluntary failure to register that they did not meet the deadline.[7.5] But a law which prohibited a person from voting in the primary election

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[5.5] In *Goosby* v. *Osser*, 409 U.S. 512 (1973), the Court unanimously held that *McDonald* did not preclude a challenge to the absolute prohibition of the right to vote by persons confined in jail awaiting trial and remanded the case for a hearing before a three-judge court. Subsequently, the Court held unconstitutional as interpreted a statute denying absentee registration and voting rights to persons confined in jail awaiting trial or serving misdemeanor sentences, but it is unclear whether the holding is premised on the fact that persons confined in jails outside the county of their residence could register and vote by absentee process while those confined in the county of their residence could not or whether the statute's jumbled distinctions among categories of qualified voters upon no rational standard made it wholly arbitrary in any event. *O'Brien* v. *Skinner*, 414 U.S. 524 (1974). The concurrence of Justices Marshall, Douglas, and Brennan indicates that the basic issue was not resolved. Id., 531. Justices Blackmun and Rehnquist dissented. Id., 535. See *American Party of Texas* v. *White*, 415 U.S. 767, 795 (1974).

[6.5] *Richardson* v. *Ramirez*, 418 U.S. 24 (1974). The Court undertook no survey of the justifications for such disqualifications as required by prior cases, saying rather than "the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2, and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court." Id., 54. Justices Marshall and Brennan dissented, id., 56, as did Justice Douglas. Id., 86.

[7.5] *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973). Justices Powell, Douglas, Brennan, and Marshall dissented. Id., 763.

of a political party if he has voted in the primary election of any other party within the preceding 23 months was subjected to strict scrutiny and was voided, inasmuch as it constituted a severe restriction upon a voter's right to associate with the party of his choice by requiring him to forego participation in at least one primary election in order to change parties.[8.5]

[8.5] *Kusper* v. *Pontikes*, 414 U.S. 51 (1973). Justices Blackmun and Rehnquist dissented. Id., 61, 65.

[P. 1515, add to text following N. 17:]

Recognizing the state interest in maintaining a ballot of reasonable length in order to promote rational voter choice, the Court observed nonetheless that filing fees alone do not test the genuineness of a candidacy or the extent of voter support for an aspirant. Therefore, effectuation of the legitimate state interest must be achieved by means that do not unfairly or unnecessarily burden the party's or the candidate's "important interest in the continued availability of political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance." "[T]he process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars." [9.5] In the absence of reasonable alternative means of ballot access, the Court held, a State may not require from an indigent candidate filing fees he cannot pay.[10.5] Nor is it permissible to condition ballot access upon a political party's willingness to subscribe to an oath that the party "does not advocate the overthrow of local, state or national government by force or violence." [11.5]

[9.5] *Lubin* v. *Panish*, 415 U.S. 709, 716 (1974).

[10.5] Concurring, Justices Blackmun and Rehnquist suggested that a reasonable alternative would be to permit indigents to seek write-in votes without paying a filing fee, id., 722, but the Court indicated this would be inadequate. Id., 719 n. 5.

[11.5] *Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441 (1974). Basis of the decision was the First Amendment with four Justices concurring on equal protection grounds. Id., 451.

[P. 1516, in text following N. 20, add:]

Reviewing under the strict test, that requires that validity turn upon a showing that restrictions upon access to the ballot are necessary to further compelling state interests, the requirements for qualification of new parties and independent candidates for ballot positions, the Court recognized as valid objectives and compelling interests the protection of the integrity of the nominating and electing process, the promotion of party stability, and the assurance of a

modicum of order in regulating the size of the ballot by requiring a showing of some degree of support for independents and new parties before they can get on the ballot.[12.5] "[T]o comply with the First and Fourteenth Amendments the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot." [13.5] Decision whether or not a state statutory structure affords a feasible opportunity is a matter of degree, "very much a matter of 'consider[ing] the facts and circumstances behind the law, the interest which the State claims to be protecting, and the interest of those who are disadvantaged by the classification.' " [14.5]

Thus, in order to assure that parties seeking ballot space command a significant, measurable quantum of community support, Texas was upheld in treating different parties in ways rationally constructed to achieve this objective. Candidates of parties whose gubernatorial choice polled more than 200,000 votes in the last general election must be nominated by primary elections and go on the ballot automatically, because the prior vote adequately demonstrates support. Candidates whose parties polled less than 200,000 but more than 2 percent may be nominated in primary elections or in conventions. Candidates of parties not coming within either of the first two must be nominated in conventions and may obtain ballot space only if the notarized list of participants at the conventions total at least one percent of the total votes cast for governor in the last preceding general election or, failing this, if in the 55 succeeding days a requisite number of qualified voters sign petitions to bring the total up to one percent of the gubernatorial vote. "[W]hat is demanded may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot", but the Court thought that one percent, or 22,000 signatures in 1972, "falls within the outer boundaries of support the State may require".[15.5] Similarly, independent candidates can be required to obtain a certain

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[12.5] *Storer* v. *Brown*, 415 U.S. 724 (1974); *American Party of Texas* v. *White*, 415 U.S. 767 (1974). It is now plain that the suggestion in the *text, p. 1516 n. 20*, of difference of treatment of voter qualifications and candidate qualification has not survived Court scrutiny. Compare *Storer* v. *Brown*, with *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973).

[13.5] *Storer* v. *Brown*, 415 U.S. 724, 746 (1974).

[14.5] Id., 730, quoting *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968).

[15.5] *American Party of Texas* v. *White*, 415 U.S. 767, 783 (1974). In *Storer* v. *Brown*, 415 U.S. 724, 738–740 (1974), the Court remanded so that the district court could determine whether the burden imposed on an independent party was too severe, it being required in 24 days to gather, in 1972, 325,000 signatures from a pool of qualified voters who had not voted in that year's partisan primary elections.

number of signatures as a condition to obtain ballot space.[16.5] A State may validly require that each voter participate only once in each year's nominating process and it may therefore disqualify any person who votes in a primary election from signing nominating or supporting petitions for independent parties or candidates.[17.5] Equally valid is a state requirement that a candidate for elective office, as an independent or in a regular party, must not have been affiliated with a political party, or with one other than the one of which he seeks its nomination within one year prior to the primary election at which nominations for the general election are made.[18.5] But it is impermissible to print the names of the candidates of the two major parties only on the absentee ballots, leaving off independents and other parties.[19.5]

[16.5] *American Party of Texas* v. *White*, 415 U.S. 767, 788–791 (1974). The percentages varied with the office but no more than 500 signatures were needed in any event.

[17.5] Id., 785–787.

[18.5] *Storer* v. *Brown*, 415 U.S. 724, 728–737 (1974). Dissenting, Justices Brennan, Douglas and Marshall thought the state interest could be adequately served by a shorter time period than a year before the primary election, which meant in effect 17 months before the general election. Id., 755.

[19.5] *American Party of Texas* v. *White*, 415 U.S. 767, 794–795 (1974). Upheld, however, was state financing of the primary election expenses that excluded convention expenses of the small parties. Id., 791–794. But the major parties had to hold conventions simultaneously with the primary elections the cost of which they had to bear.

[P. 1518, add to N. 5:]

The district court decision holding the apportionment decisions inapplicable to election of judges was summarily affirmed. *Wells* v. *Edwards*, 409 U.S. 1095 (1973) (Justices White, Douglas, and Marshall dissenting). For another exception, see *Salyer Land Co.* v. *Tulare Water Storage District*, 410 U.S. 719 (1973), and *Associated Enterprises* v. *Toltec Watershed Imp. Dist.*, 410 U.S. 743 (1973).

[P. 1519, in text following N. 11, add:]

Significant changes of policy have occurred in the Court's treatment of the population equality requirement of the apportionment cases. Relying upon language in prior decisions that distinguished legislative apportionment from congressional districting as possibly justifying different standards of permissible deviations from policy, the Court has held that more flexibility is constitutionally permissible with respect to the former than to the latter.[20.5] But it was in determining how much greater flexibility was permissible that the Court moved in new directions. First, applying the traditional standard of rationality rather than the strict test of compelling necessity, the Court

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[20.5] *Mahan* v. *Howell*, 410 U.S. 315, 320–325 (1973).

held that a maximum 16.4% deviation from equality of population was justified by the State's policy of maintaining the integrity of political subdivision lines, or according representation to subdivisions *qua* subdivisions, because the legislature was responsible for much local legislation.[21.5] Second, just as the first case "demonstrates, population deviations among districts may be sufficiently large to require justification but nonetheless be justifiable and legally sustainable. It is now time to recognize . . . that minor deviations from mathematical equality among state legislative districts are insufficient to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." [22.5] This recognition of a *de minimis* deviation, below which no justification was necessary, was mandated, the Court felt, by the margin of error in census statistics, by the population change over the ten-year life of an apportionment, and by the relief it afforded federal courts able thus to avoid over-involvement in essentially a political process. The "goal of fair and effective representation" is furthered by eliminating gross population variations among districts, but is not achieved by mathematical equality solely. Other relevant factors are to be taken into account.[23.5]

[21.5] Id., 325–330. The Court indicated that a 16.4% deviation "may well approach tolerable limits". Id. 329. Dissenting, Justices Brennan, Douglas, and Marshall would have applied the compelling interest test and voided the state plan. Id., 333. Additionally, they thought the deviation was actually 23.6% and that the plan discriminated geographically against one section of the State, an issue not addressed by the Court.

[22.5] *Gaffney* v. *Cummings*, 412 U.S. 735, 745 (1973). The maximum deviation was 7.83%. The Court did not precisely indicate at what point a deviation had to be justified but it applied the *de minimis* standard in *White* v. *Regester*, 412 U.S. 755 (1973), in which the maximum deviation was 9.9%. "Very likely, larger differences between districts would not be tolerable without justification". Id., 764. Justices Brennan, Douglas, and Marshall dissented. Id., 772.

[23.5] *Gaffney* v. *Cummings*, 412 U.S. 735, 748, 749 (1973).

[P. 1519, add to N. 13:]

Upholding an apportionment plan frankly admitted to have been drawn with the intent to achieve a rough approximation of the statewide political strengths of the two parties, the Court recognized the goal as legitimate and observed that, while the manipulation of apportionment and districting is not wholly immune to judicial scrutiny, "we have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States." *Gaffney* v. *Cummings*, 412 U.S. 735, 751, 754 (1973).

[P. 1520, at the end of the first paragraph on the page, add:]

Perhaps surprisingly in the light of *Whitcomb* v. *Chavis* [24.5] and its high standard of proof, the Court in *White* v. *Regester* [25.5] affirmed a district court invalidation of the use of multimember districts in two Texas counties on the ground that, when considered in the totality of the circumstances of discrimination in registration and voting and in access to other political opportunities, such use denied Negroes and Mexican-Americans the opportunity to participate in the election process in a reliable and meaningful manner. The holding indicates that the status of multimember districts is more unsettled than had previously been thought.[26.5]

[24.5] 403 U.S. 124 (1971).

[25.5] 412 U.S. 755, 765–770 (1973). "To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." Id., 765–766.

[26.5] The issue is before the Court in the coming Term in cases involving alleged racial discrimination, *White* v. *Regester*, *prob. juris noted*, 417 U.S. 906 (1974), and political discrimination. *Chapman* v. *Meier*, *prob. juris noted*, 416 U.S. 966 (1974). See also *Mahan* v. *Howell*, 410 U.S. 315, 330–333 (1973), in which three single-member districts were combined into a multimember district with three representatives because of inadequate census data.

[P. 1521, add to N. 19:]

See also *Salyer Land Co.* v. *Tulare Water Storage District*, 410 U.S. 719 (1973); *Associated Enterprises v. Toltec Watershed Imp. Dist.*, 410 U.S. 743 (1973).

[P. 1522, add to N. 8:]

Shapiro was reaffirmed and extended in *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974), voiding a requirement of one year's residency in a county as a condition to an indigent's receiving nonemergency hospitalization or medical care at the county's expense. The opinion is basically a restatement of the necessity for a compelling interest to support the condition and a rejection of the proffered set of interests, little different from the set offered in *Shapiro*. Chief Justice Burger and Justice Blackmun concurred in the result only and Justice Rehnquist dissented. Id., 277.

[P. 1522, add to N. 9:]

The Court has found justified by proffered state interests the imposition of 50-day durational residency requirements (or closure of registration 50 days before the election) in *Marston* v. *Lewis*, 410 U.S. 679 (1973), and *Burns* v. *Fortson*, 410 U.S. 686 (1973). Justices Douglas, Brennan, and Marshall dissented. Id., 682, 688.

[P. 1522, add to N. 10:]

In *Vlandis* v. *Kline*, 412 U.S. 441, 452 and n. 9 (1973), and see id., 456, 464, 467 (concurring and dissenting opinions), the Court indicated in dicta that a one-year durational residency qualification for lower instate tuition at public colleges was constitutionally justifiable. Justices Marshall and Brennan indicated reservations about the point, id., 454, but Justice Marshall's opinion for the Court in *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 256 (1974), notes the result and repeats that "some 'waiting periods . . . may not be penalties' " and would thus be valid.

[P. 1525, in text following N. 15, add:]

But, deciding a point left unresolved in *Douglas*, the Court held that neither the due process nor the equal protection clause required a State to furnish counsel to a convicted defendant seeking, after he has exhausted his appeals of right, to obtain discretionary review of his case in the State's higher courts or in the United States Supreme Court. Due process fairness does not require that after an appeal has been provided the State must always provide counsel to indigents at every stage. "Unfairness results only if indigents are singled out by the State and denied meaningful access to that system because of their poverty." That essentially equal protection issue was decided against the defendant in the context of an appellate system in which one appeal could be taken as of right to an intermediate court, with counsel provided if necessary, and in which further appeals might be granted not primarily upon any conclusion about the result below but upon considerations of significant importance.[1.5]

[1.5] *Ross* v. *Moffitt*, 417 U.S. 600 (1974). See also *Fuller* v. *Oregon*, 417 U.S. 40 (1974) (statute providing, under circumscribed conditions that indigent defendant, who receives state-compensated counsel and other assistance for his defense, who is convicted, and who subsequently becomes able to repay costs, must reimburse State for costs of his defense in no way operates to deny him assistance of counsel or the equal protection of the laws).

[P. 1527, add to end of second paragraph under this section:]

Extending *Bullock*, the Court has held it impermissible for a State to deny indigents, and presumably other persons unable to pay filing fees, a place on the ballot for failure to pay filing fees, however reasonable in the abstract the fees may be. A State must provide such persons a reasonable alternative for getting on the ballot.[2.5]

[2.5] *Lubin* v. *Panish*, 415 U.S. 709 (1974). Note that the Court indicates that *Bullock* was decided on the basis of restrained review. Id., 715.

[P. 1527, add to text following N. 25:]

The *Boddie* opinion left unsettled whether a litigant's interest in judicial access to effect a pacific settlement of some dispute was an interest entitled to some measure of constitutional protection as a value of independent worth or whether a litigant must be seeking to resolve

a matter involving a fundamental interest in the only forum in which any resolution was possible. Subsequent decisions established that the latter answer was the choice of the Court. In *United States* v. *Kras*,[3.5] the Court held that the imposition of filing fees which blocked the access of an indigent to a discharge of his debts in bankruptcy denied the indigent neither due process nor equal protection. The marital relationship in *Boddie* was a fundamental interest, the Court said, and upon its dissolution depended associational interests of great importance; however, an interest in the elimination of the burden of debt and in obtaining a new start in life, while important, does not rise to the same constitutional level as marriage. Moreover, a debtor's access to relief in bankruptcy has not been monopolized by the government to the same degree as dissolution of a marriage; one may, "in theory, and often in actuality," manage to resolve the issue of his debts by some other means, such as negotiation. While the alternatives in many cases, such as Kras', seem barely likely of successful pursuit, the Court seemed to be suggesting that absolute preclusion was a necessary element before a right of access could be considered.[4.5]

Subsequently, on the initial appeal papers and without hearing oral argument, the Court summarily upheld the application to indigents of a filing fee that in effect precluded them from appealing decisions of a state administrative agency reducing or terminating public assistance.[5.5]

Educational Opportunity.—Making even clearer its approach in *de facto* wealth classification cases, the Court in *San Antonio*

[3.5] 409 U.S. 434 (1973). Involving as it did a federal statute the case was decided under the Fifth Amendment's due process clause which includes an equal protection standard. See *text, pp. 1162–1165.*

[4.5] Id., 443–446. The equal protection argument was rejected by utilizing the traditional standard of review, bankruptcy legislation being placed in the area of economics and social welfare, and the use of fees to create a self-sustaining bankruptcy system being considered to be a rational basis. Dissenting, Justice Stewart argued that *Boddie* required a different result, denied that absolute preclusion of alternatives was necessary, and would have evaluated the importance of an interest asserted rather than providing that it need be fundamental. Id., 451. Justice Marshall's dissent was premised on an asserted constitutional right to be heard in court, a constitutional right of access regardless of the interest involved. Id., 458. Justices Douglas and Brennan concurred in Justice Stewart's dissent, as indeed did Justice Marshall.

[5.5] *Ortwein* v. *Schwab*, 410 U.S. 656 (1973). The division was the same 5-to-4 that prevailed in *Kras*. That there are still unsettled areas here is revealed by the decision of the Court to review a case in which the right to appeal an adverse trial court decision was conditioned on the posting of a bond in twice the amount of the judgment rendered in the trial court. The case was remanded for consideration of intervening state court decisions following oral argument. *Patterson* v. *Warner*, 415 U.S. 303 (1974).

School Dist. v. *Rodriguez* [6.5] rebuffed an intensive effort with widespread support in lower court decisions to invalidate the system prevalent in 49 of the 50 States of financing schools primarily out of property taxes with the consequent effect that the funds available to local school boards in each state was widely divergent. Plaintiffs had sought to bring their case within the strict scrutiny—compelling state interest doctrine of equal protection review by claiming that under the tax system there resulted a *de facto* wealth classification that was "suspect" or that education was a "fundamental" right and the disparity in educational financing could not therefore be justified. The Court held, however, that there was neither a suspect classification nor a fundamental interest involved, that the system must be judged by the traditional restrained standard, and that the system was rationally related to the State's interest in protecting and promoting local control of education.[7.5]

Important as the result of the case is, the doctrinal implications are far more important. The attempted denomination of wealth as a suspect classification failed on two levels. First, the Court noted that plaintiffs had not identified the "class of disadvantaged 'poor' " in such a manner as to further their argument. That is, the Court found that the existence of a class of poor persons, however defined did not correlate with property-tax poor districts; neither as an absolute nor as a relative consideration did it appear that tax-poor districts contained greater numbers of poor persons than did property-rich districts, except in random instances. Second, the Court held, there must be an absolute deprivation of some right or interest rather than merely a relative one before the deprivation because of inability to pay will bring into play strict scrutiny. "The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." [8.5] No such class had been identified here and more importantly no one was being absolutely denied an education; the argument was that it was a lower quality education than that available to other districts. Even assuming that to be the case, however, it did not create a suspect classification.

[6.5] 411 U.S. 1 (1973). The opinion by Justice Powell was concurred in by the Chief Justice and Justices Stewart, Blackmun, and Rehnquist. Justices Douglas, Brennan, White, and Marshall dissented. Id., 62, 63, 70.

[7.5] Id., 44–55. Applying the rational justification test, Justice White would have found that the system did not use means rationally related to the end sought to be achieved. Id., 63.

[8.5] Id., 20. But see id., 70, 117–124 (Justice Marshall and Douglas dissenting).

Education is an important value in our society, the Court agreed, being essential to the effective exercise of freedom of expression and intelligent utilization of the right to vote. "But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. . . . [T]he answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution." [9.5] A right to education is not expressly protected by the Constitution, continued the Court, and it was unwilling to find an implied right because of its undoubted importance. The quality of education increases the effectiveness of speech or the ability to make informed electoral choice but the judiciary is unable to determine what level of quality would be sufficient. Moreover, the system under attack did not deny educational opportunity to any child, whatever the result in that case might be; it was attacked for providing relative differences in spending and those differences could not be correlated with differences in educational quality.[10.5]

Rodriguez clearly promises judicial restraint in evaluating challenges to the affording of governmental benefits when the effect is relatively different because of the wealth of some of the recipients and when the results, what is obtained, vary in relative degrees. But even within the context of this restraint it seems evident that not all such challenges must fail.[11.5]

[9.5] Id., 30, 33–34. But see id., 62 (Justice Brennan dissenting), 70, 110–117 (Justices Marshall and Douglas dissenting).

[10.5] Id., 29–39.

[11.5] Thus, the Court reviewed a New York system under which indigent elementary public school children did not receive a loan of textbooks unless the voters of each district voted to levy a tax for that purpose, but after argument the case was remanded to determine the issue of mootness. *Johnson* v. *State Educ. Dept.*, 409 U.S. 75 (1972). Similarly, the Court accepted for review a case in which it was contended that the failure of a school system to provide English language instruction to a large number of students of Chinese ancestry who spoke little or no English denied the students equal protection, but it held for the students on statutory grounds. *Lau* v. *Nichols*, 414 U.S. 563 (1974).

Sec. 2. Apportionment of Representation

[P. 1529, in text following N. 3, add:]

However, in *Richardson* v. *Ramirez*,[1.5] the Court relied upon the implied approval of disqualification upon conviction of crime to uphold a state law disqualifying convicted felons for the franchise even after the service of their terms. It declined to assess the state

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[1.5] 418 U.S. 24 (1974). Justices Marshall, Douglas, and Brennan dissented. Id., 56, 86.

interests involved and to evaluate the necessity of the rule, holding rather that because of § 2 the equal protection clause was simply inapplicable.

Sec. 5. Enforcement

[P. 1538, add N. 26 to the end of the paragraph and insert as text of N. 26:]

[26] In *Anderson* v. *United States*, 417 U.S. 211 (1974), the Court avoided decision whether a conspiracy under color of law to cast false ballots in elections for local offices in the absence of racial motivations could be prosecuted under 18 U.S.C. § 241, punishing conspiracies to deny to any citizen the enjoyment "of any right or privilege, secured to him by the Constitution." Justices Douglas and Brennan argued that § 241 could be applied to prosecute election offenses when state or local elections were involved only when racial bias was the motivation. Id., 228.

AMENDMENT 21—REPEAL OF EIGHTEENTH AMENDMENT

[P. 1580, add to N. 17:]

The principle was reaffirmed in *United States* v. *State Tax Comm.*, 412 U.S. 363 (1973), holding that Mississippi could not apply its tax regulations to liquor sold to military officers' clubs and other nonappropriated fund activities located on bases within the State and over which the United States had obtained exclusive jurisdiction. "[A]bsent an appropriate express reservation . . . the Twenty-first Amendment confers no power on a State to regulate—whether by licensing, taxation, or otherwise—the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction." Id., 375. As to bases over which the United States exercised concurrent jurisdiction only, the same principle did not apply, but the Court sent this part of the case back to the District Court for initial resolution. Id., 379–381. Justices Douglas and Rehnquist dissented. Id., 381.

[P. 1580, add new section following N. 19 in text:]

State Power versus First Amendment Restraint.—In *California* v. *LaRue*,[1.5] the Court sustained the facial constitutionality of regulations barring a lengthy list of actual or simulated sexual activities, and motion picture portrayals of these activities, in establishments licensed to sell liquor by the drink. It was conceded that the regulations reached expression that would not be deemed legally obscene under prevailing standards and reached expressive conduct that would not be prohibitable under prevailing standards, but the Court thought that the second section of the Twenty-first Amendment established a presumption of validity attaching to state regulation of liquor which, when applied to bar the questioned activities in places selling liquor by the drink, permitted such regulations to have a broader reach than they could otherwise constitutionally have.[2.5] In

[1.5] 409 U.S. 109 (1972).

[2.5] Id., 114–119. Justices Brennan and Marshall dissented, arguing that the regulations were overbroad and therefore unconstitutional and, additionally, that they constituted an unconstitutional condition upon possession of a liquor license, requiring the licensee to give up his First Amendment rights in return for a license. Id., 123. Justice Douglas dissented on other grounds. Id., 120. For the possible limits of this decision, see *Peto* v. *Cook*, 364 F. Supp. 1 (D.C.S.D. Ohio, 1973), *aff'd per curiam*, 415 U.S. 943 (1974) (regulations proscribing and permitting seizure of magazines not determined in an adversary hearing to be obscene when sold on premises where liquor is sold for off-premises consumption invalid under First and Fourth Amendments).

addition to the First Amendment implications of the decision, the Court's recurrence to the Twenty-first Amendment as the source of state power indicates a continuation of judicial refusal to restrain state regulation of alcoholic beverages that would otherwise raise commerce clause questions.

[P. 1581, add to N. 21:]

In *Heublein, Inc.* v. *South Carolina Tax Comm.*, 409 U.S. 275 (1972), while holding that a state regulatory scheme valid under the Twenty-first Amendment had the effect of requiring an out-of-state manufacturer to undertake activities which took it outside the protection of a federal statute and thus not being required to evaluate the result of a federal-state conflict in the liquor area, the Court observed: "[T]hough the relation between the Twenty-first Amendment and the force of the Commerce Clause in the absence of congressional action has occasionally been explored by this Court, we have never squarely determined how that Amendment affects Congress' power under the Commerce Clause." Id., 282 n. 9. Justice Blackmum, however, thought the federal law did apply but that state power under the Amendment overrode congressional power. Id., 284.

TWENTY-FIFTH AMENDMENT

Presidential and Vice-Presidential Vacancy

[P. 1591, add at end of text]

This Amendment saw multiple use in this period, that resulted at the end in the accession to the Presidency and Vice-Presidency for the first time in our history of two men who had not faced the voters in a national election. First, Vice President Spiro Agnew resigned on October 10, 1973, and President Nixon nominated Gerald R. Ford of Michigan to succeed him, following the procedures of § 2 of the Amendment for the first time. Hearings were held upon the nomination by the Senate Rules Committee and the House Judiciary Committee, both Houses thereafter confirmed the nomination, and the new Vice President took the oath of office December 6, 1973. Second, President Richard M. Nixon resigned his office August 9, 1974, and Vice President Ford immediately succeeded to the office and took the presidential oath of office at noon of the same day. Third, again following § 2 of the Amendment, President Ford nominated Nelson A. Rockefeller of New York to be Vice President on August 20, 1974, and the nomination was pending before Congress at this writing.

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ACTS OF CONGRESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART BY THE SUPREME COURT OF THE UNITED STATES

[P. 1618, add No. 87a in list]

87a. Act of September 2, 1958 (§ 5601(b)(1), 72 Stat. 1399).

Provision of Internal Revenue Code creating a presumption that one's presence at the site of an unregistered still shall be sufficient for conviction under a statute punishing possession, custody, or control of an unregistered still unless defendant otherwise explained his presence at the site to the jury is unconstitutional because the presumption is not a legitimate, rational, or reasonable inference that defendant was engaged in one of the specialized functions proscribed by the statute.

United States v. *Romano*, 382 U.S. 136 (1965).

[P. 1619, at end of list add:]

93. Act of July 31, 1946 (ch. 707, § 7, 60 Stat. 719).

District court decision holding invalid under First and Fifth Amendments of statute prohibiting parades or assemblages on United States Capitol grounds is summarily affirmed.

Chief of Capitol Police v. *Jeanette Rankin Brigade*, 409 U.S. 972 (1972).

94. Act of September 2, 1958 (§ 1(25)(B), 72 Stat. 1446), and Act of September 7, 1962 (§ 401, 76 Stat. 469).

Federal statutes providing that spouses of female members of the Armed Services must be dependent in fact in order to qualify for certain dependent's benefits whereas spouses of male members are statutorily deemed dependent and automatically qualify for allowances, whatever their actual status, is invalid under the equal protection principles of the Fifth Amendment's due process clause.

Frontiero v. *Richardson*, 411 U.S. 677 (1973).
Concurring: Justices Brennan, Douglas, White, and Marshall.
Concurring specially: Justices Powell and Blackmun and Chief Justice Burger, Justice Stewart.
Dissenting: Justice Rehnquist.

95. Act of July 30, 1965 (§ 339, 79 Stat. 409).

Section of Social Security Act qualifying certain illegitimate children for disability insurance benefits but disqualifying children if the

disabled wage earner parent did not contribute to the child's support before the onset of the disability or if the child did not live with the parent before the onset of disability denies such children equal protection guaranteed by the due process clause of the Fifth Amendment.

Jimenez v. *Weinberger*, 417 U.S. 628 (1974).

96. Act of January 2, 1968 (§ 163(a)(2), 81 Stat. 872).

District court decisions holding unconstitutional under Fifth Amendment's due process clause section of Social Security Act that reduced, perhaps to zero, benefits coming to illegitimate children upon death of parent in order to satisfy the maximum payment due the wife and legitimate children are summarily affirmed.

Richardson v. *Davis*, 409 U.S. 1069 (1972).
Richardson v. *Griffin*, 409 U.S. 1069 (1972).

97. Act of January 11, 1971 (§ 2, 84 Stat. 2048).

Provision of Food Stamp Act disqualifying from participation in program any household containing an individual unrelated by birth, marriage, or adoption to any other member of the household violates the due process clause of the Fifth Amendment.

Department of Agriculture v. *Moreno*, 413 U.S. 528 (1973).
Concurring: Justices Brennan, Douglas, Stewart, White, Marshall, Blackmun, and Powell.
Dissenting: Justice Rehnquist and Chief Justice Burger.

98. Act of January 11, 1971 (§ 4, 84 Stat. 2049).

Provision of Food Stamp Act disqualifying from participation in program any household containing a person 18 or older who had been claimed as a dependent child for income tax purposes in the present or preceding tax year by a taxpayer not a member of the household violates the due process clause of the Fifth Amendment.

Department of Agriculture v. *Murry*, 413 U.S. 508 (1972).
Concurring: Justices Douglas, Brennan, Stewart, White, and Marshall.
Dissenting: Justices Blackmun, Rehnquist, Powell, and Chief Justice Burger.

STATE ACTS HELD UNCONSTITUTIONAL

[P. 1768, at end of list: add:]

797. *Texas Board of Barber Examiners* v. *Bolton*, 409 U.S. 807 (1972).

District court decision holding invalid under equal protection clause Texas statutes prohibiting licensed cosmetologists from working with male customers and prohibiting licensed barbers from working with female customers is summarily affirmed.

798. *Essex* v. *Wolman*, 409 U.S. 808 (1972).

District court decision holding void under the establishment clause of the First Amendment an Ohio statute providing a reimbursement grant to parents of children attending nonpublic schools is summarily affirmed.

799. *Sterrett* v. *Mothers' and Children's Rights Organization*, 409 U.S. 809 (1972).

District court decision holding invalid as in conflict with federal Social Security Act an Indiana statute denying benefits to persons aged 16 to 18 who are eligible but for the fact that they are not regularly attending school is summarily affirmed.

800. *Robinson* v. *Hanrahan*, 409 U.S. 38 (1972).

Illinois statute providing for mailing of vehicle forfeiture proceeding notification to home address of vehicle owner is unconstitutional as applied to person known to the State to be incarcerated and not at home.

801. *Amos* v. *Sims*, 409 U.S. 942 (1972).

District court decision holding unconstitutional Alabama legislative apportionment law is summarily affirmed.

802. *Fugate* v. *Potomac Electric Power Co.*, 409 U.S. 942 (1972).

District court decision holding invalid under equal protection clause Virginia statute allowing reimbursement to utilities required by interstate highway construction to relocate their lines in cities and towns but denying reimbursement to utilities required by interstate highway construction to relocate lines in counties is summarily affirmed.

803. *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972).

Ohio statute authorizing trial for certain ordinance violations and traffic offenses before mayor responsible for village finances when the fines, forfeitures costs, and fees imposed in the mayor's courts provided a

substantial portion of village funds denied defendants opportunity for trial before an impartial and disinterested tribunal.

Justices Concurring: Brennan, Douglas, Stewart, Marshall, Blackmun, and Powell, and Chief Justice Burger.
Justices Dissenting: White and Rehnquist.

804. *Evco* v. *Jones*, 409 U.S. 91 (1972).

New Mexico's gross receipts tax is unconstitutionally applied to proceeds from transactions whereby material is produced in State under contract for delivery to out-of-state clients because it impermissibly burdens interstate commerce.

805. *Philpott* v. *Welfare Board*, 409 U.S. 413 (1973).

New Jersey statute providing for recovery by State of reimbursement for financial assistance when recipient subsequently obtains funds cannot be applied to obtain reimbursement out of federal disability insurance benefits inasmuch as federal law bars subjecting such funds to any legal process.

806. *Georges* v. *McClellan*, 409 U.S. 1120 (1973).

District court decision holding unconstitutional under due process clause Rhode Island prejudgment attachment statute is summarily affirmed.

807. *Gomez* v. *Perez*, 409 U.S. 535 (1973).

Texas law denying right of enforced paternal support to illegitimate children while granting it to legitimate children violates equal protection clause.

808. *Roe* v. *Wade*, 410 U.S. 113 (1973).

Texas statute making it a crime to procure or to attempt to procure an abortion except on medical advice to save the life of the mother infringes upon a woman's right of privacy protected by the due process clause of the Fourteenth Amendment.

Justices Concurring: Blackmun, Douglas, Brennan, Stewart, Marshall, Powell, and Chief Justice Burger.
Justices Dissenting: White and Rehnquist.

809. *Doe* v. *Bolton*, 410 U.S. 179 (1973).

Georgia statute permitting abortions under prescribed circumstances nevertheless invalidly imposed a number of procedural limitations: that the abortion be performed in an accredited hospital, be approved by a staff committee and two licensed physicians other than woman's own doctor, and be available only to residents.

Justices Concurring: Blackmun, Douglas, Brennan, Stewart, Marshall, Powell, and Chief Justice Burger.
Justices Dissenting: White and Rehnquist.

810. *Mahan* v. *Howell*, 410 U.S. 315 (1973).

Portion of Virginia apportionment statute assigning large numbers of naval personnel to actual location of station when evidence showed substantial numbers resided in surrounding areas distorted population balance of districts within the one county and was void.

811. *Whitcomb* v. *Communist Party of Indiana*, 410 U.S. 976 (1973).

District court decision holding invalid under First and Fourteenth Amendments Indiana statute requiring political party to submit oath that party has no relationship to a foreign government as a condition of ballot access is summarily affirmed.

812. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973).

New Mexico use tax may not constitutionally be applied on personal property that Indian tribe purchased out-of-state and installed as permanent improvement on off-reservation ski resort owned and operated by tribe.

813. *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164 (1973).

Arizona income tax is invalidly applied to Navajo Indian residing on reservation and whose income is wholly derived from reservation sources.

814. *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973).

New Jersey statute denying assistance to families in which parents are not ceremonially married denies equal protection to children in such families.

Justices Concurring: Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell, and Chief Justice Burger.
Justice Dissenting: Rehnquist.

815. *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973).

Wisconsin statute as interpreted to permit revocation of parole without a hearing denies due process of law.

816. *Parker* v. *Levy*, 411 U.S. 978 (1973).

District court decision voiding as arbitrary denial of equal protection Louisiana's constitutional provision and statute distributing among political subdivisions property relief fund is summarily affirmed.

817. *Miller* v. *Gomez*, 412 U.S. 914 (1973).

District court decision holding a denial of equal protection New York statute denying jury trial on issue of dangerousness to persons being committed to hospitals for criminally insane after felony indictment but before trial is summarily affirmed.

818. *Vlandis* v. *Kline*, 412 U.S. 441 (1973).

Connecticut statute creating irrebuttable presumption that student from out-of-state at time of application to state college remained non-

resident for tuition purposes for entire student career violated due process clause.

Justices Concurring: Stewart, Brennan, Marshall, Blackmun, and Powell.
Justice Concurring Specially: White.
Justices Dissenting: Chief Justice Burger and Rehnquist and Douglas.

819. *Wardius* v. *Oregon*, 412 U.S. 470 (1973).

Oregon statute requiring defendant to give pretrial notice of alibi defense and names of supporting witnesses but denying defendant any reciprocal right of discovery of rebuttal evidence denies him due process of law.

820. *White* v. *Regester*, 412 U.S. 755 (1973).

Establishment of multimember legislative districts in certain Texas urban areas in context of pervasive electoral discrimination against blacks and Mexican-Americans denied equal protection of laws.

821. *White* v. *Weiser*, 412 U.S. 783 (1973).

Texas congressional districting law creates districts with too great a population disparity and is void under equal protection clause.

822. *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973).

New York statute to reimburse nonpublic schools for administrative expenses incurred in carrying out state mandated examination and record keeping requirements but requiring no accounting and separating of religious and nonreligious uses violates establishment clause.

Justices Concurring: Chief Justice Burger and Stewart, Blackmun, Powell, and Rehnquist.
Justices Concurring Specially: Douglas, Brennan, and Marshall.
Justice Dissenting: White.

823. *Sugarman* v. *Dougall*, 413 U.S. 634 (1973).

823. *Sugarman* v. *Dougall*, 413 U.S. 634 (1973).

hold permanent positions in competitive civil service violates equal protection clause.

Justices Concurring: Blackmun, Douglas, Brennan, Stewart, White, Marshall, Powell, and Chief Justice Burger.
Justice Dissenting: Rehnquist.

824. *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973).

New York education and tax laws providing grants to nonpublic schools for maintenance and repairs of facilities and providing tuition reimbursements and income tax benefits to parents of children attending nonpublic schools violate the establishment clause.

Justices Concurring: Powell, Douglas, Brennan, Stewart, Marshall, and Blackmun.
Justices Concurring and Dissenting: Chief Justice Burger and Rehnquist.
Justice Dissenting: White.

825. *Sloan* v. *Lemon*, 413 U.S. 825 (1973).

Pennsylvania statute providing for reimbursement of parents for portion of tuition expenses in sending children to nonpublic schools violates establishment clause.

Justices Concurring: Powell, Douglas, Brennan, Stewart, Marshall, and Blackmun.

Justices Dissenting: White, Rehnquist, and Chief Justice Burger.

826. Accord: *Grit* v. *Wolman*, 413 U.S. 901 (1973).

827. *Stevenson* v. *West*, 413 U.S. 902 (1973).

South Carolina legislative apportionment statute is invalid.

828. *Nelson* v. *Miranda*, 413 U.S. 902 (1973).

Arizona constitutional and statutory provisions denying public employment to aliens violates equal protection clause.

829. *Texas* v. *Pruett*, 414 U.S. 802 (1973).

Federal court decision that Texas statutory system that denies good time credit to convicted felons in jail pending appeal while allowing good time credit to incarcerated nonappealing felons unconstitutionally burdens right of appeal is summarily affirmed.

830. *Department of Game* v. *Puyallup Tribe*, 414 U.S. 44 (1973).

Washington State statute construed to prohibit net fishing by Indians is invalid.

831. *Kusper* v. *Pontikes*, 414 U.S. 51 (1973).

Illinois statute prohibiting one who has voted in one party's primary election from voting in another party's primary election for at least 23 months violates the First and Fourteenth Amendments.

Justices Concurring: Stewart, Douglas, Brennan, White, Marshall, and Powell.

Justice Concurring Specially: Chief Justice Burger.

Justices Dissenting: Blackmun and Rehnquist.

832. *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973).

New York statute providing for cancellation of public contracts and disqualification of contractors from doing business with the State for refusal to waive immunity from prosecution and to testify concerning state contracts violates the Fifth Amendment privilege against self-incrimination.

833. *Danforth* v. *Rodgers*, 414 U.S. 1035 (1973).

District court decision invalidating Missouri abortion statute is summarily affirmed.

834. *Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441 (1974).

Indiana statute prescribing loyalty oath as qualification for access to ballot violates First and Fourteenth Amendments.

835. *O'Brien* v. *Skinner*, 414 U.S. 524 (1974).

New York election law provisions that permit persons incarcerated outside county of residence while awaiting trial to register and vote

absentee while denying absentee privilege to persons incarcerated in county of residence denies equal protection.

Justices Concurring: Chief Justice Burger and Douglas, Brennan, Stewart, White, Marshall, and Powell.
Justices Dissenting: Blackmun and Rehnquist.

836. *Wallace* v. *Sims*, 415 U.S. 902 (1974).

District court decision holding invalid Alabama apportionment statute is summarily affirmed.

837. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974).

Arizona statute imposing one-year county residency requirement for eligibility for nonemergency medical care for indigents at state expense infringes upon right to travel and violates equal protection clause.

Justices Concurring: Marshall, Brennan, Stewart, White, and Powell.
Justices Concurring Specially: Douglas, Blackmun, and Chief Justice Burger.
Justice Dissenting: Rehnquist.

838. *Davis* v. *Alaska*, 415 U.S. 308 (1974).

Alaska statute protecting anonymity of juvenile offenders was unconstitutionally applied to prohibit cross-examination of prosecution witness for possible bias in violation of confrontation clause.

Justices Concurring: Chief Justice Burger and Douglas, Brennan, Stewart, Marshall, Blackmun, and Powell.
Justices Dissenting: White and Rehnquist.

839. *Smith* v. *Goguen*, 415 U.S. 566 (1974).

Massachusetts statute punishing anyone who treats the flag "contemptuously" without anchoring proscription to specified conduct and modes is unconstitutionally vague.

Justices Concurring: Powell, Douglas, Brennan, Stewart, and Marshall.
Justice Concurring Specially: White.
Justices Dissenting: Blackmun, Rehnquist, and Chief Justice Burger.

840. *Lubin* v. *Panish*, 415 U.S. 709 (1974).

California statute imposing a filing fee as the only means of getting on the ballot with no alternative denies indigents equal protection.

841. *Schwegmann Bros. Giant Super Markets* v. *Louisiana Milk Comm.*, 416 U.S. 922 (1974).

District court decision holding invalid as burden on interstate commerce Louisiana statute construed to permit commission to regulate prices at which dairy products are sold outside the State to Louisiana retailers is affirmed.

842. *Beasley* v. *Food Fair*, 416 U.S. 653 (1974).

North Carolina right-to-work law giving employees discharged by reason of union membership cause of action against employer cannot be applied in case of supervisors in view of 29 U.S.C. § 164(a) which pro-

vides that no law shall compel an employer to treat a supervisor as an employee.

843. *Indiana Real Estate Comm.* v. *Satoskar*, 417 U.S. 938 (1974).

District court decision invalidating Indiana statute limiting real estate dealer licenses to citizens is summarily affirmed.

844. *Marburger* v. *Public Funds for Public Schools*, 417 U.S. 961 (1974).

District court decisions invalidating under establishment clause New Jersey laws providing reimbursement for parents of nonpublic school children for textbooks and other materials are summarily affirmed.

845. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).

Florida statute compelling newspapers to publish free replies by political candidates criticized by newspapers violates First Amendment.

846. *Letter Carriers* v. *Austin*, 418 U.S. 264 (1974).

Virginia statute creating cause of action for "insulting words" as construed to permit recovery for use in labor dispute of words "scab" and similar words is preempted by federal labor law.

Justices Concurring: Marshall, Brennan, Stewart, White, and Blackmun.
Justice Concurring Specially: Douglas.
Justices Dissenting: Powell, Rehnquist, and Chief Justice Burger.

847. *Spence* v. *Washington*, 418 U.S. 405 (1974).

Washington State statute prohibiting "improper use" of flag or display of the flag with any emblem superimposed on it was invalidly applied to a person who taped a peace symbol on the flag in a way as not to damage it and who then displayed it upside down from his own property.

Justices Concurring: Brennan, Stewart, Marshall, and Powell.
Justices Concurring Specially: Douglas and Blackmun.
Justices Dissenting: Rehnquist, White, and Chief Justice Burger.

848. Accord: *Cahn* v. *Long Island Vietnam Moratorium Committee*, 418 U.S. 906 (1974).

ORDINANCES HELD UNCONSTITUTIONAL

[P. 1785, at end of list, add:]

94. *Cason* v. *City of Columbus*, 409 U.S. 1053 (1972).

Ordinance prohibiting use of abusive language toward another as applied by court below without limitation to fighting words cannot sustain conviction.

95. *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624 (1973).

Ordinance placing an 11 p.m. to 7 a.m. curfew on jet take-offs from local airport is invalid as in conflict with the regulatory scheme of federal statutory control.

Justices Concurring: Douglas, Brennan, Blackmun, Powell, and Chief Justice Burger.

Justices Dissenting: Rehnquist, Stewart, White, and Marshall.

96. *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974).

Ordinance interpreted by state courts to punish the use of opprobrious words to police officer without limitation of offense to uttering of fighting words is invalid.

Justices Concurring: Brennan, Douglas, Stewart, White, and Marshall.

Justice Concurring Specially: Powell.

Justices Dissenting: Blackmun, Rehnquist, and Chief Justice Burger.

SUPREME COURT DECISION OVERRULED BY SUBSEQUENT DECISIONS

[P. 1797, at end of list, add:]

*	144. *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973).	*Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389 (1928).
*	145. *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973).	*Ahrens* v. *Clark*, 335 U.S. 188 (1948).
*	146. *Miller* v. *California*, 413 U.S. 15 (1973).	*A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General*, 383 U.S. 413 (1966).
*	147. *North Dakota Pharmacy Board* v. *Snyder's Drug Stores*, 414 U.S. 156 (1973).	*Liggett Co.* v. *Baldridge*, 278 U.S. 105 (1929).
*	148. *Edelman* v. *Jordan*, 415 U.S. 651 (1974).	*Shaprio* v. *Thompson*, 394 U.S. 618 (1969) (in part); *State Dept. of Health & Rehabilitation Services* v. *Zarate*, 407 U.S. 918 (1972); *Sterrett* v. *Mothers' & Childrens' Rights Organization*, 409 U.S. 809 (1973).
*	149. *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974).	*Fuentes* v. *Shevin*, 407 U.S. 67 (1972) (in part).

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